STATUTES

OF IOWA

RELATING TO RAILWAYS,

AND NOTES OF DECISIONS THEREUNDER.

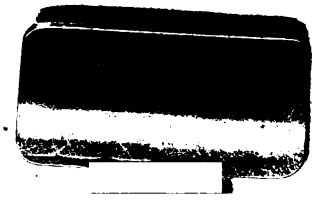
(From the report of the Railroad Commissioners for 1891.)

PREPARED BY

EMLIN McCLAIN,

Chancellor of the Law Department of the State University, and Compiler of McClain's Annotated Code and McClain's Iowa Digest.

DES MOINES:
G. D. ELOCHARD, STATE PRINTER.
1891.



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APPENDIX A.

STATUTES RELATING TO RAILWAYS,

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EXPLANATORY NOTE.

The following pages give the statutes of this state now in force, directly relating to railroads. The sections are printed in the order in which they occur in McClain's Annotated Code of 1888, with the amendments and additional statutes of the Twenty-Third General Assembly (1890) incorporated in the proper places. The numbers of the sections are the same as in the Annotated Code. At the beginning of each section, after the catch words, is given the number of the section in the Code of 1873 (the last compilation of the state statutes made by public authority), or if the section is part of a statute passed since the adoption of said Code, then a reference to the session, chapter, and section. Where a section of the Code of 1873 or of a subsequent statute has been amended, the amending statute is also referred to at the beginning of the section, which is then printed as thus changed. At the end of each section, in brackets, are given references to corresponding sections of the Revision of 1860, the Code of 1851, and statutes passed prior to 1873. These last named references are of no importance in determining what the law now is but show what the legislative history of the section has been.

Following the sections are notes of decisions relating thereto made by the Supreme Court of Iowa or by the Federal Courts. These notes, also, are taken from the Annotated Code above referred to, later decisions up to the first of January, 1891, being noted in their proper places. It will be understood that these notes are intended merely as brief statements of the points decided or discussed in the opinions of the courts, and that the opinions themselves should be consulted in order to get the full import of the cases.

E. McC.

Iowa City, January 15, 1891.

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615. Regulation of Speed. 456. They shall have power to prevent injury or annoyance from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated; to regulate the transportation and keeping of gunpowder or other combustibles, and to provide or license magazines for the same; to prevent and punish fast or immoderate riding or driving of horses through the streets; to regulate the speed of trains and locomotives on railways running over the streets or through the limits of the city or incorporated town by ordinance, and enforce the same by a fine not exceeding one hundred dollars; to establish and regulate markets; to provide for the measuring or weighing of hay, coal, or any other article of sale; to prevent any riots, noise, disturbance, or disorderly assemblages; to suppress and restrain disorderly houses, houses of ill-fame, billiard tables, nine or ten pin alleys, or tables and ball alleys, and to authorize the destruction of all instruments or devices used for purposes of gaming, and to protect the property of the corporation and its inhabitants and to preserve peace and order therein. [R., § 1057.]

623. Laying of tracks on streets. Compensation. 464. 15 G. A., ch. 6. They shall have power to lay off, open, widen, straighten, narrow, vacate, extend, establish and light streets, alleys, public grounds, wharves, landing, and market places, and to provide for the condemnation of such real estate as may be necessary for such purposes. They shall also have the power to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places; but no railway track can thus be located and laid down until after the injury to property abuting upon the street, alley or public places upon which such railway track is proposed to be located and laid down has been ascertained and compensated in the manner provided for taking private property for works of internal improvement in chapter four of title ten of the code of 1873. [R., § 1064.]

The provisions as to taking private property for works of internal improvement are §§ 1904–1936, *infra*. The provisions are by § 923 made applicable to cities under special charter.

Right to locate railways upon streets. Since the change made in Code, § 1262, by 15 G. A., ch. 47, (see § 1930), the power to authorize the laying down of tracks for street and other railways, and the use of steam motors

thereon does not exist except as here given, the earlier case of *Milburn v. Cedar Rapids*, 12–246, and many cases following it, being no longer applicable. *Stanley v. Davenport*, 54–463; *Stange v. Hill & West Dubuqae St. R Co.*, 54–669.

The provisions of this section are not applicable to cities acting under special charter. *Ibid.; Simplot v. Chicago, M. & St. P. R. Co.*, 5 McCrary, 158. [But now see § 923.]

An ordinance authorizing the construction of railway tracks upon city streets, without making the right to occupy such streets conditional upon payment of damages as required by the statute, does not confer any rights upon the railway company. *Stange v. Dubuque*, 62–303.

Where the fee of the street is in the city for the use and benefit of the public, the general assembly has the control thereof, and may prescribe the terms and conditions under which the public may use such streets. *Sears v. Marshalltown R. Co.*, 65–742.

Consent by City Council. The statute does not prescribe the manner by which authority may be granted to a railroad company to construct its track upon the streets of the city, and such authority may be be given by resolution duly passed, or by vote duly taken, appearing in the proper record of the city *Merchants' Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 70–105.

The city council may authorize the laying of a railway track over an alley, although the effect may be to prevent the use of the alley for other purposes. Whether the same rule would apply in case of a street, *quœre*. *Heath v. Des Moines, St. L. R. Co.*, 61–11.

But the city council is not authorized to devote an alley to a railway track for the private benefit of some individual; and the fact leave has been granted to lay the track over an alley for purely private benefit will not prevent a subsequent grant of a right to a railway company to lay a track through such alley for public use. *Ibid.*

The city having been given by this section the power to grant the right to lay down a railway track over its streets, all else in connection therewith is a matter of detail and within the discretion of the city, subject only to equitable control and proper police regulation. *O'Niel v. Lamb*, 53–725.

Consent of owner. If the owner of lots joins with the owners of other lots abutting on the street in an agreement that a track may be laid and operated, and in pursuance of such agreement the company lays down such track and is commencing to operate it, the land owner is estopped from recovering damages, and a subsequent grantee of the lots being chargeable with notice of the rights of the company from the fact that it is in possession is equally bound by such estoppel. *Merchants' Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 79–613.

Compensation to property owners. A railway which has been located over the streets of a city, at a time when compensation to adjacent property owners for such use of the street was not required, cannot lay new switches and side tracks in connection with such railway, without making compensation. *Drady v. Des Moines & Ft. D. R. Co.*, 57–393; *Merchants' Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 70–105.

The statutory provisions requiring compensation apply to a railroad authorized by ordinance and partly constructed prior to the time that the change in the statute went into effect. *Mullholland v. Des Moines, A. & W. R. Co.*, 60–740; *Hanson v. Chicago, M. & St. P. R. Co.*, 61–588.

Where a railway company had commenced the use of its tracks constructed under permission granted by the city council before the statutory change requiring compensation, *held*, that it could not afterward be made liable for damages to abutting lot owners. *Merchants' Union Barb Wire Co. v. Chicago R. I. & P. R. Co.*, 70–105.

The right of the owner of an abutting lot is not within the constitutional provision requiring just compensation to be made to the owner of land appropriated to public use. Aside of the provision of this section, the owner of abutting property is not entitled to damages, and under this provision his claim is one for damages only; and, *held*, that where one track was rightfully laid on the street in front of plaintiff's property in 1870 and the other in 1874,

without damages being paid, plaintiff was not entitled to equitable relief by way of an injunction to abate and remove said tracks. *Merchants' Union Barb Wire Company v. Chicago, R. I. & P. R. Co.*, 79-613.

When the road is located upon private property and not upon a street an abutting owner cannot recover damages resulting from the ordinary operation of the road. *Rinard v. Burlington & N. R. Co.*, 66-440. Nor can damages be recovered from the city in such a case for injuries from an embankment. *Callahan v. Des Moines*, 63-705.

The provision as to making compensation for injury to property abutting on a street upon which a railway track is proposed to be located are only applicable to property owners whose property abuts upon the portion of the street occupied by the track, and not to owners of property abutting upon a street which is merely crossed by the track. *Morgan v. Des Moines & St. L. R. Co.*, 64-589.

The purpose of the provision of this section with reference to railways in streets is to forbid the occupancy of streets by railways running longitudinally, but it also forbids the crossing of a street diagonally in front of an abutting lot, except in accordance to the requirements of the statute. A diagonal crossing may occupy a street for a distance which practically would have the same effect in injuring an abutting lot-owner as the longitudinal occupancy of the street. *Enos v. Chicago, St. P. & K. C. R. Co.*, 78-28.

The damages to be allowed to an abutting property owner by reason of the construction of a track over a street are not limited to damages arising from a change of grade, but extend to all legitimate damages which are contemplated in other provisions for condemning the right of way. *Drady v. D. M. & Ft. D. R. Co.*, 57-393.

In estimating the damages caused by the operation of a steam railway along a street where damages to the property owner have not been previously assessed and paid, the fact that such operation has diverted travel from the street may be shown in evidence as showing the manner in which the rental value of the property has been diminished, and for the purpose of ascertaining the measure of damages. *Stange v. Dubuque*, 62-303.

In an action for such damages all the facts attending the use and operation of the railroad may properly be given in evidence as bearing upon the effect of the operation of the road on the rental value of the property: such, for instance, as annoyance to the occupants of the property by noise, escape of fire from engines, etc. *Wilson v. Des Moines O. & S. R. Co.*, 67-509.

Where a witness has given his opinion that the depreciation of value in property, caused by the construction of defendant's track on the street, did not exceed a certain amount, *held*, that he might be asked on cross-examination by plaintiff whether the annual premium for insurance would be higher *Eslich v. Mason City & Fort D. R. Co.*, 75-443.

In a proceeding to assess damages to abutting property by reason of the location and operation of a railway upon a street, the property owner is entitled to be compensated for injuries which he will sustain on account both of the laying down of the track in the street on which his property abuts, and of the appropriation of his land, if any, which is taken for right of way purposes. *McClean v. Chicago, I. & D. R. Co.*, 67-568.

The provisions of this section as to the manner of assessment of damages resulting from the location of a railway upon the streets of a city refer exclusively to the company and not to the abutting owner; such owner does not have any interest in the fee of the street, and he cannot take steps to have his damages assessed by a sheriff's jury according to the provisions applicable where property is taken for right of way; therefore, he may bring action for damages without such proceeding. *Mulholland v. Des Moines, A. & W. R. Co.*, 60-740. *Harbach v. Des Moines & K. C. R. Co.*, 80-593.

The provision with reference to assessing damages for laying a railroad track through the streets refers exclusively to the railroad company and not to the abutting owners. The latter cannot have his damages assessed in that manner. *Stough v. Chicago & N. W. R. Co.*, 71-641.

As the abutting property owner is not authorized to cause his damages to be assessed, and the corporation alone can institute the proceedings, an action by the property owner may be maintained for damages accruing to

him before the assessment is made. *Wilson v. Des Moines, O. & S. R. Co.*, 67–509.

A right of action for injuries to an abutting property owner accrues at once and is entire, and must be brought in five years. Such a right of action does not pass to the grantee under a conveyance made subsequent to the time when the right of action accrues, and, without an assignment of such cause or action to him, grantee can maintain no action for such injuries: *Pratt v. Des Moines N. W. R. Co.*, 72–249; *Jolly v. Des Moines N. W. R. Co.*, 72–759.

Where a track is laid in the street without right, an action against a purchaser of the road under foreclosure is not barred until the statutory period after such purchaser assumes to maintain such track. *Harbach v. Des Moines & K. C. R. Co.*, 80–593.

Where a track is laid down and operated under express authority of the city council, the damages recoverable may be assessed on the theory that it is a permanent structure for which the damages are entire, so that the statute of limitations is put in operation from the time the structure is completed. In such a case successive actions for damages cannot be maintained. *Merchants Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 79–613.

In an action by a lot owner for damages caused by the railway company constructing its road so that the rails were above the established grade, being so constructed on the theory that under the ordinances of the city the company was entitled to lay its ties on the grade, *held* that the company could not object that damages were assessed on the theory that such obstruction was permanent. *Eslich v. Mason City & Ft. D. R. Co.*, 75–443.

Special damages: A railway company which so negligently builds its track over the streets of a city, or so occupies such streets, as to create a nuisance, is liable in damages to any one suffering therefrom special injury not common to the whole public. *Park v. Chicago & S. W. R. Co.*, 43–636; *Frith v. Dubuque*, 45–406.

It is immaterial in such case whether the party injured owns the fee in the street or not. *Cadle v. Muscatine Western R. Co*, 44–11; *Frith v. Dubuque*, 45–406; *Cain v. Chicago, R. I. & P. R. Co.*, 54–255.

If a railway, therefore, be constructed in a careless, improper and negligent manner, to the injury of an abutting property owner, he may recover damages, provided his injury be special. *Cain v. Chicago, R. I & P. R. Co.*, 54–255.

So the city may, by ordinance, make and enforce reasonable restrictions, and a use of the street in violation of such restrictions will be a nuisance for which a person sustaining special damage may recover. *Ibid*

The city is not liable for damages resulting from the laying down of tracks, etc., under permission granted by it. *Frith v. Dubuque*, 45–406.

Although a railway company is liable for negligence in failing to keep its crossings where the track intersects the street in proper condition, such liability does not relieve the city from liability for injuries from such defects in its streets. *Fowler v. Strawberry Hill*, 74–644.

As to the measure of damages in such cases, see *Cadle v. Muscatine W. R. Co.*, 44–11; *Frith v. Dubuque*, 45–406; *O'Connor v. St. L., K. C. & N. R. Co.*, 56–735; *Kucheman v. Chicago, C. & D. R. Co.*, 46–366.

Injunction: The fact that the property owners gets judgment for damages does not prevent his having a remedy by injunction if such damages are not paid, where the occupancy of the street is without any authority. *Harbach v. Des Moines & K. C. R. Co.*, 80–593.

Where a railway is sold under foreclosure the purchaser stands in the same position as the former owner. *Ibid.*

Equitable Control: The doctrine of equitable control over the use of the streets by railway companies, which was recognized when such companies had the right to use the streets of cities for railway purposes without compensation to property owners, or consent of the city, has now no application. *Heath v. Des Moines & St. Louis R. Co.*, 61–11.

637. Donation of sites for depots, shops, etc. 19 G. A., ch. 133, § 1. It shall be lawful for any incorporated town or city to procure for the purpose

of donating, and to donate, to any railway company owning a line of railroad in operation or in process of construction in such incorporated town or city, sufficient land for depot grounds, engine-houses, and machine shops for the construction and repair of engines, cars, and other machinery necessary to the convenient use and operation of said railroad.

638. Submission of question. 19 G. A., ch. 133, § 2. Before such donation shall be made or appropriation of funds to procure land for such purpose, a petition shall be presented to the trustees or council of such incorporated town or city, signed by a majority of the resident freehold taxpayers of such incorporated town or city, asking that such donation be made and limiting the sum to be appropriated for that purpose. Upon the presentation of such a petition, a special election of such city or town shall be called. On the ballots used at such election shall be printed the words, "for the donation" and "against the donation," and if a two-thirds majority of the qualified electors voting at such election shall vote for the donation, said trustees or council shall determine the site to be donated, designating the boundaries thereof, and the amount to be appropriated in procuring said site, not exceeding the amount named in said petition; and may in the name of such incorporated town or city procure said land by purchase, or by payment of the estimated damages in case said land or any part thereof shall be taken in the name of such railway company by process of condemnation for railroad purposes, and may also vacate any streets and alleys within the boundaries of said site and may prescribe the terms, conditions, and limitations upon which such grant shall be made, which shall be binding upon the railway company accepting such donation: *Provided* that land set apart as a park, public square, or levee shall not be appropriated or donated under the provisions of this act, and no land occupied with buildings used for business purposes or as private residences shall be appropriated or donated under the provisions of this act, unless the consent of the owners thereof shall first be obtained.

725. Requiring gates at street crossings. 22 G. A., ch. 16, § 1. All cities of the first class and cities of the second class having over seven thousand inhabitants and cities organized under special charters in this state in addition to the powers now granted, shall have the further additional powers conferred by this act, as follows, to wit: they shall have power to establish, build and regulate market houses, slaughter houses; to license and regulate bill posters; to repair temporary sidewalks without notice to the property owner and provide by ordinance the manner of assessing the expense thereof on the property in front of which such repairs are made; to remove snow or ice from the sidewalk without notice to the property owner and provide by ordinance for the manner of assessing the expense thereof on the property in front of which such snow or ice shall be removed; *provided,* however, that the expense thereof shall not exceed one and one-half cent per front foot of any lot; *provided,* that the snow or ice has remained upon the walk for the period of fifteen hours; to repair paving, curbing, sewers and catch-basins; to regulate telegraph, telephone, electric light, district telegraph and other electric wires, and provide the manner in which, and places where the same shall be placed upon, along or under the streets and alleys of such city; to regulate the price of gas, electric light, water rates and to regulate and fix the charges for water meters, gas meters, electric light meters, or any other

device or means necessary for determining the consumption of gas, water or electric light. This shall not be construed to authorize the passage of an ordinance or resolution on the making of any contract, whereby the above powers are abriged. To fix the charges for making gas, electric light, steam heating, water, telephone and district telegraph connections; to compel street railway companies, whenever any street is ordered paved to pave and maintain in width three and one-half feet each way commencing at the center of the space between the rails, and in case of failure to do so to provide by ordinance for such paving and maintenance, and for the manner of assessing against such companies the cost thereof; to compel railroad companies to erect, construct, maintain and operate under such regulations as may from time to time be provided by the council, suitable gates upon public streets at railroad crossings; to provide that magazines used for the keeping of gunpowder, inflammable oils and other combustibles, shall not be located or maintained within a certain distance of the corporate limits of such cities; to provide that before any association, company, society, order, exhibition or aggregation of persons shall parade or march upon the streets of such cities, that they shall first obtain from the mayor of such city a permit, when issued to be without charge, and the same shall state the time, manner and conditions of such parade or march; to provide by ordinance that the width of all streets and alleys, of all additions to such cities, shall be graded in the same manner, and that they shall conform to the width of the existing streets and alleys of such cities; to expel and remove from office, by a vote of three-fourths of the members of the city council any elective officer of such city charged with any crime under the statutes of this state, and such removal shall be provided by section five hundred and thirty of the code, title four, chapter ten [§ 729], for the removal of members of the city council, to make its bonds for all purposes now provided by law or hereafter to be provided by law, payable on or before a date named, or payable at a date certain, as the city council may determine. And such cities shall have full control of the bridge fund levied and paid upon the property within their corporate limits, and shall have the right to use the same for the construction of bridges and culverts and approaches thereto, repairing the same and paying bridge bonds and interest thereon, issued by such city; and it is hereby made the duty of the board of supervisers of the counties within which such cities are located to levy annually upon all the taxable property within such city such a per centum for that purpose as may be directed by the city council of such cities not exceeding the limit fixed by law: *provided* that no contract heretofore made respecting the application of the bridge tax shall be affected hereby.

829. Requiring paving of tracks. 20 G. A., ch. 20, § 6. All railway companies and street railway companies in cities of the first class as provided in section one of this act [§ 824], shall be required to pave, or repave between rails and one foot outside of their rails, at their own expense and cost. Whenever any street, highway, avenue or alley shall be ordered paved or repaved by the council of any such city, such paving or repaving between and outside of the rails, shall be done at the same time and shall be of the same material and character as the paving or repaving of the street, highway, avenue or alley upon which said railway track is located, or of such other material as said council may order, and when said paving or repaving is done said companies shall lay in the best approved manner the

strap or flat rail. Such railway companies shall keep that portion of the streets, highways, avenues or alleys between and one foot outside of their rails, up to grade and in good repair, using for such purpose the same material as said council may order. In the event of the neglect or refusal of such railway companies to pave, or repave, or repair as aforesaid, when so ordered and directed as aforesaid by the council of such city, such city shall have power to pave, repave or repair between and outside of said rails as herein required of such railway companies, and cost and expenses of the same to assess and levy as a special tax upon any of the real estate or personal property of such railway company, within the corporate limits of said city, which tax shall be a lien upon said property, shall become delinquent in sixty days after it is levied, shall draw interest at the rate of seven per cent per annum, and said city shall have power to enforce the payment of the same in the same manner and by the same means and with and under the same penalties as is provided herein with reference to special taxes upon the abutting property on the streets, highways, avenues or alleys, ordered to be improved as aforesaid, as hereinbefore provided.

[The cities provided for in § 824 herein referred to are cities of the first class that have been or may be so organized since January first, 1881.]

923. Location of tracks in streets of cities under special charter. 18 G. A., ch. 96, § 1. Section four hundred and sixty-four of the code of 1873, as amended by chapter six of the public laws of the fifteenth general assembly [§ 623], shall be applicable to cities and towns organized and acting under special charters, and such cities and towns shall have all the powers conferred by said section on cities and towns incorporated under the general incorporation law.

988. Cannot take stock. 553. No county, city, or incorporated town in this state, shall in their corporate capacity, or by their officers, directly or indirectly, subscribe for stock, or become interested as a partner, shareholder, or otherwise, in any banking institution, whether the same be a bank of issue, deposit, or exchange, nor in any plank road, turnpike, or railway, or in any other work of internal improvement; nor shall they be allowed to issue any bonds, bills of credit, script, or other evidences of indebtedness for any such purposes—all such evidences of indebtedness for said purposes being hereby declared absolutely void; *provided nevertheless*, that this section shall not be so construed as to prevent, or in anywise to embarrass, the counties, cities or towns, or any of them, in the erection of their necessary public buildings, bridges, laying off highways, streets, alleys, and public grounds, or other local works in which said counties, cities or towns may respectively be interested. [R., § 1345.]

[As to voting taxes in aid of railways, see §§ 2081-2089.]

989. Aid bonds void. 554. All bonds or other evidences of debt, hereafter issued by any corporation to any railway company as capital stock shall be null and void, and no assignment of the same shall give them any validity. [R., § 1346.]

TAXATION OF PROPERTY AND OF BRIDGES.

1281. Real property not used in operation, and bridges. 808. Lands, lots, and other real estate belonging to any railway company, not exclusively used in the operation of the several roads, and all railway

bridges across the Mississippi and Missouri river, shall be subject to assessment and taxation on the same basis as the property of individuals in the several counties where situated. [14 G. A., ch. 26, §§ 8, 10.]

Railway property: The right of way of a railroad company, and land held by it for depot purposes, are subject to taxation. Although they are taken for public use they are the property of the corporation. *Burlington & M. R. R. Co. v. Spearman*, 12-112.

Under the act of 1858, which made the property of a railway corporation taxable through its shares of stock only, it was held that real property inside a city, owned by the company and used as depot grounds, was liable for sidewalk tax. *Ibid.*

Under former statutes by which the property of corporations was taxable only through the shares of stock of its stockholders, *held* that land owned by a railroad company was not taxable as real property. *Tallman v. Treasurer*, 12-531; *Dubuque & S. C. R. Co. v. Dubuque*, 17-120; *Faxton v. McCosh*, 12-527; *Davenport v. Mississippi & M. R. Co.*, 12-539 Also, *held*, that the provision of the Code of '51, that stock owned by non-resident stockholders in railroad and similar corporations in this state should be taxable in the county where either terminus of the road was situated, was valid. *Faxton v. McCosh*, 12-527.

Under the Revision the property of railroads was to be assessed and taxed in the same manner as the property of individuals. *Iowa Homestead Co. v. Webster County*, 21-221; *Dubuque P. R. Co. v. Webster County*, 21-235.

As to whether the track, depot grounds, buildings, etc., of a railroad corporation, situated within the limits of a city, were under, 9 G. A., ch. 173, which imposed a tax of one per cent per annum upon the gross earnings in lieu of all taxes for any and all purposes, subject to municipal taxation, the supreme court were equally divided; *Davenport v. Mississippi & M. R. Co.*, 16-348; *Dubuque & S. C. R. Co. v. Dubuque*, 17-120.

But under 12 G. A., ch. 196, similar to the act last referred to, it was held that such property was subject to taxation for municipal purposes and that the one per cent was only in lieu of state and county taxes. *Dunlieth & Dubuque Bridge Co. v. Dubuque*, 32-427; *Davenport v. Chicago, R. I & P. R. Co.* 38-633; *Dubuque v. Chicago, D. M. R. Co.*, 47-196; and that 14 G. A., ch. 26, § 9, by which it was sought to release railway companies from such taxes previously levied, was unconstitutional. *Dubuque v. Illinois Cent. R. Co.*, 39-56.

As to whether, under the acts of 1862 and 1868 above referred to, the rolling stock of a railway corporation was subject to municipal taxation in the city where the company had its principal place of business, see the cases of *Davenport v. Mississippi & M. R. Co.; Dubuque & S. C. R. Co. v. Dubuque; Dubuque v. Illinois Cent. R. Co., supra.*

As to taxation of railway property under present law, see §§ 1281, 1286, 2016-2022.

Bridges. The right of the railway company to use the government bridge over the Mississippi river at Davenport, *held* not taxable, except as railroad property under § 2016. *Chicago R. I. & P. R. Co. v. Davenport*, 51-451. The provisions of this section relate to the bridges mentioned, while those of § 2018 apply to other railway bridges. This section is not unconstitutional on the ground that it is not of uniform operation. *Missouri Valley & B. R. & B Co. v. Harrison County*. 74-283.

These bridges are to be taxed as bridges and not as a part of the railroad, whether owned by the railroad or by private individuals. *Chicago M. & St. P. R. Co. v. Sabula*, 19 Fed. Rep., 177.

While the United States supreme court has decided that it is the duty of the Union Pacific Railroad Company to operate its whole line, including the bride at Council Bluffs, yet so much of the bridge as is in Iowa may be taxed under the Code of Iowa as a bridge, and not merely the bridge as a part of the road, more especially since that railroad enjoys in relation thereto all the substantial franchises of a bridge company. *Union Pacific R. Co. v. Pottawattamie County*, 4 Dillon, 497.

Railroad bridges across the Mississippi river are under this section taxed as realty belonging to the company. *Keithsburg Bridge Co. v. McKay*, 42 Fed. Rep., 427.

1282. Land grants. 20 G. A., ch. 28, § 1. All lands lying within the state of Iowa, which have been heretofore granted or may be hereafter granted to any railroad company or corporation by the general government or by the general government to the state of Iowa and by the state granted to any such railroad company or corporation shall be subject to assessment and taxation within the counties wherein situated from and after the year the same may be earned, to the same extent as though patents had been issued to, and the title of record was in such railroad companies or corporations. The fact that such lands are claimed by more than one such company or corporation shall in no way affect the liability of such lands to assessment and levy, *provided*, nothing herein contained is intended to subject any lands to taxation for the past that were not taxable prior to the passage of this act.

1283. Evidence. 20 G. A., ch. 28, § 3. Parol evidence shall be admissible to prove when said lands were earned.

1284. 20 G. A., ch. 28, §4. All acts or parts of acts inconsistent with this act are hereby repealed.

1285. Roadbeds. 809. No real estate used by railway corporations for road-beds shall be included in the assessment to individuals of the adjacent property, but all such real estate shall be deemed to be the property of such companies for the purpose of taxation; nor shall real estate, occupied for and used as a public highway, be assessed and taxed as a part of adjacent lands whence the same was taken for such public purpose. [14 G. A., ch. 89.]

1286. Other property. 810. All railway property not specified in section eight hundred and eight of this chapter [§ 1281], shall be taxed upon the assessment made by the executive council as provided in chapter five of title ten, [§§ 2016–2022], at the same rates, by the same officers, and for the same purposes as individual property under the provisions of this chapter; and all provisions of this title relating to the levy and collection of taxes shall apply to the taxes so levied upon railway property. [14 G. A., ch. 26, §§ 6, 7.]

Under the act of 1858, which made the property of the railway corporations taxable through their shares of stock only, it was held that real property inside a city, owned by the company and used as depot grounds, was liable for sidewalk tax. *Burlington & M. R. R. Co. v. Spearman*, 12–112.

PENALTIES ON AID TAXES.

1348. Provisions not applicable. 866. 20 G. A., ch. 194, § 1. The treasurer shall continue to receive taxes after they become delinquent until collected by distress and sale; and if the one-half of the taxes charged against any entry on the tax book in the hands of the county treasurer be not paid before the first day of April after the same has been charged; or if the remaining half of such taxes has not been paid before the first day of October after its maturity, he shall collect, in addition to the tax of each tax payer so delinquent, as penalty for non-payment, interest on such delinquent taxes, at the rate of one per cent per month thereafter until paid; *provided*,

that in all cases where the half of any taxes has not been paid before the first day of April after the same has been charged on the tax books, penalty as above shall be collected on the whole amount of taxes charged against such entry from the first of March succeeding the levy; and *provided also*, that the penalty prescribed by this section shall not apply upon taxes levied by any court to pay judgment on city or county indebtedness, but upon such taxes no other penalty than the interest, which such judgment draws, shall be collected; and *provided further*, nothing in this chapter shall be construed to alter the present rules governing the collection of road taxes, save that all such tax collected by the county treasurer shall be included in the first installment, and *provided further*, that the penalties provided by this section shall not apply to or be collected upon any taxes levied in aid of the construction of any railroad in this state. [R., § 760; C., '51, § 497; 9 G. A., ch. 173, § 18; 13 G. A., ch. 90.]

[By special provision the changes made in this section by 20 G. A., ch. 194, took effect the second Monday in November, 1884.]

The clause relating to railroad aid taxes *held* unconstitutional as applied to contracts executed before that provision took effect. *Lansing v. County Treasurer*, 1 Dillon, 522, 528.

RAILWAY AND TOLL BRIDGES.

1547. Supervisors to control location. 1031. Any railway or bridge company that now is, or hereafter may be, incorporated in pursuance of the laws of this state, or of the states of Wisconsin, Illinois, Kansas, Nebraska or Dakota is authorized to construct a railway bridge across the Mississippi, Missouri or Big Sioux rivers, connecting with the eastern or western terminus, as the case may be, of any railway abutting on the Iowa bank of either of said rivers, at such place as shall be designated therefor by the board of supervisors of the county wherein such abutting is to be made and extending toward a point on the opposite bank that may be selected by such company. [10 G. A., ch. 130, § 1, 2, 4.]

1548. Plan to be approved. 1032. No bridge shall be built under the provisions of the preceding section, until the plan thereof has been submitted to and approved by the board of supervisors of the county in which the bridge is to be partly located. [Same, § 3.]

1549. For teams and passengers; toll for. 1033. Any such company may, with the consent of said board of supervisors, construct such bridge with suitable highways and foot ways for teams and foot passengers, and charge such rates of toll therefor as may be approved by said board. [Same, § 6.]

1550. Ferry established. 1034. Any such company may establish a ferry across said rivers at or near the termini of its road, for the sole purpose of crossing the freight and passengers of such highways until the bridge is ready for use, [Same, § 7.]

1551. Navigation. 1035. No bridge erected under the provisions of this chapter shall be so located or constructed as to unnecessarily impede, injure, or obstruct the navigation of said rivers. [Same, § 11.]

1552. Bonds and stock. 1036. Any such company may issue its bonds or obligations for an amount not exceeding the cost of such bridge, and of its road in the state, and may secure the payment thereof by a mortgage on the

same, and may issue certificates of common and preferred stock; the preferred stock to be issued only on condition that the holders of the common stock give their written consent thereto. [Same, § 5.]

1553. Resident director; process. 1037. Each company acting under the provisions of this chapter shall elect at least one director, who shall be a citizen of and reside in the state of Iowa, and such company shall be liable to be sued in any court of competent jurisdiction in the state, and service of the original notice on said resident director shall be sufficient notice to the company of the pendency of the action. [Same, § 8, 9.]

1554. Contract by city for use of bridge. 15 G. A., ch. 5, § 1; 21 G. A., ch., 173, § 2. All cities situated on any river in the state of Iowa or any river forming the boundary line of said state, whether organized and existing under special charter or general law, and from which to the opposite shore of any of said rivers a bridge has been or may be constructed by any railroad or other private company, corporation or person, shall have power to contract with the company, co[r]poration or person owning such bridge for the use of the same as a public highway; which use may be jointly with any company, corporation or person having or desiring the right to use the same for the passage of cars propelled by steam or otherwise, or may be for the sole use of such portion of such bridge as may be devoted and adapted to highway travel, and in such contract may have the right to assume the sole or any portion of the liability for damage to persons or property by reason of their being on any portion of said bridge or on any approach to either end thereof caused by the running of cars or locomotives by any corporation, company or person entitled to use the said bridge, whether the damage results from the negligence of the persons engaged in running said cars or locomotives or otherwise, and to indemnify and save harmless the owners of said bridge, and any or all corporations, companies or persons entitled to use the same from all liability or damage so caused to the extent or proportion thereof assumed in the said contract. And the said city may cause to be assessed and levied each year, upon the taxable property of said city a tax not exceeding ten mills on the dollar each year, to raise a special fund to carry out the terms of the said contract. And the said city may thereafter and during the continuance of said contract manage and control the said bridge so far as necessary to regulate the highway travel thereon, and may regulate the same as a free or toll-bridge, and prescribe such rates of toll as to it, from time to time, shall seem proper, and make all necessary police regulations for the government of the highway travel on said bridge.

INDIVIDUAL LIABILITY OF STOCKHOLDERS.

1618. Provisions not applicable. 1068. A failure to comply substantially with the foregoing requisitions in relation to organization and publicity, renders the individual property of the stockholders liable for the corporate debts. But this section shall not be deemed applicable to railway corporations and corporators, and stockholders in railway companies shall be liable only for the amount of stock held by them in said companies. [R., §§ 1166, 1338; C., '51. § 689.]

Stockholders in railway companies are, by express provision, not liable beyond the amount of stock held by them in such companies. *First Nat. Bank v. Davies*, 43-424.

A construction company having power under its articles to construct and operate a railway corporation within the meaning of the statute. *Ibid.*; *Langan v. Iowa & M. Const. Co.*, 49–317.

PERMITS TO FOREIGN CORPORATIONS.

1641. Filing articles. 21 G. A. ch. 76, § 1. Hereafter any corporation for pecuniary profit other than for carrying on mercantile or manufacturing business organized under the laws of any other state or of any other territory of the United States or of any foreign country desiring to transact its business, or to continue in the transaction of its business in this state shall be and hereby is required, on and after September, [first] A. D. 1886, to file with the secretary of state a certified copy of its articles of incorporation duly attested, accompanied by a resolution of its board of directors or stockholders, authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state. Said application to contain a stipulation that said permit shall be subject to each of the provisions of this act. And thereupon the secretary of state shall issue to such corporation a permit in such form as he may prescribe for the general transaction of the business of such corporation. And upon the recept of such permit such corporation shall be permitted and authorized to conduct and carry on its business in this state. *Provided* that nothing in this act contained shall be construed, to prevent any foreign corporations, from buying, selling, and otherwise dealing, in notes, bonds, mortgages, and other securities, or from enforcing the collection of the same, in the federal courts, in the same manner, and to the same extent, as is now authorized by law.

1642. Eminent domain. 21 G. A., ch. 76, § 2. No foreign corporation which has not in good faith complied with the provisions of this act, and taken out a permit, shall hereafter be authorized to exercise the power of eminent domain or exercise any of the right and privileges conferred upon corporations until they have so complied herewith and taken out such permit.

1643. Removal of causes. 21 G. A., ch. 76, § 3. Any foreign corporation sued or impleaded in any of the courts of this state upon any contract made or executed in this state or to be performed in this state or for any act or omission, public or private, arising, originating, or happening in the state, who shall remove any such cause from such state court into any of the federal courts held or sitting in this state, for the cause that such corporation is a nonresident of this state or a resident of another state than that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or authority granted to such corporation to transact business in this state; such forfeiture to be determined from the record of the removal, and to date from the date of filing of the application on which such removal is affected [effected], and whenever any corporation shall thus forfeit its said permit no new permit shall be issued to it for the space of three months, unless the executive council shall for satisfactory reasons cause it to be issued sooner.

The statute is unconstitutional for the reason that it makes the stipulation not to remove cases to the federal courts a condition for obtaining the permit to do business. *Barron v. Burnside*, 121 U. S., 186.

1644. Penalty. 21 G. A., ch. 76, § 4. Any foreign corporation that shall carry on its business and transact the same on and after September first, 1886, in the state of Iowa by its officers, agents, or otherwise, without having complied with this statute and taken out, and having a valid permit shall forfeit and pay to the state for each and every day in which said business is transacted and carried on the sum of one hundred dollars to be recovered by suit in any court having jurisdiction. And any agent, officer or employe who shall knowingly act or transact such business for such corporation when it has no valid permit as provided herein shall be guilty of a misdemeanor and for each offense shall be fined not to exceed one hundred dollars or imprisoned in the county jail not to exceed thirty days and pay all costs of prosecution.

1645. 21 G. A., ch. 76, § 5. All acts and parts of acts inconsistent with the provisions hereof are hereby repealed; *provided*, that nothing contained in this act shall relieve any company, corporation, association or partnership from the performance of any duty or obligation now enjoined upon them or required of them or either of them by the laws now in force.

RIGHT OF WAY ON LEVEES.

1864. May be granted by supervisors. 20 G. A., ch. 186, § 1. Ditches or drains may be located and constructed within the limits of any public highway and on either or both sides thereof, and levees or embankments upon and along the same; *provided*, they are so constructed as not to prevent public travel thereon. The engineer or commissioner appointed to locate ditches, drains, levees or embankments, may recommend the establishment of a public highway upon and along the route of the same, and the board of supervisors may establish the same on such recommendation in the same manner as on the report of a highway commissioner. All levees built by taxation under the drainage laws shall be under the control of the board of supervisors of the county in which they are situated, and the board shall have the power to grant the right of way thereon to any railway company that will maintain the same while used for railway purposes; *provided*, the steps for condemnation and payment therefor, contained in chapter four, title ten, of the code, shall first be taken by said company; *provided further*, that nothing in this section shall be construed so as to require such ditches or levees to be kept up at the expense of the county.

TILE DRAINS ACROSS RIGHT OF WAY.

1883. Construction; costs. 20 G. A., ch. 188, § 6; 22 G. A., ch. 96, § 6. Whenever any railroad crosses the land of any person or persons who desire to drain their land for any of the purposes set forth in section one of this act [§ 1878], the party or parties desiring such drain or drains shall notify the railroad company by leaving a written notice with the nearest station agent, stating in such notice the starting point, route or termination of such drain or drains, and if the railroad company refuse or neglect for the space of thirty days to dig across their right of way a drain of equal depth and size of the one dug by the party who sishes [wishes] to drain his land, then

the party who desires to drain the land may proceed to dig such drain and the railroad company shall be liable for the cost of the construction of such drain, to be collected in any court having jurisdiction.

TAKING PRIVATE PROPERTY.

1904. For what uses; width. 1241; 17 G. A., ch. 126. Any railway corporation organized in this state, or chartered by or organized under the laws of the United States or any state or territory, may take and hold, under the provisions of this chapter, so much real estate as may be necessary for the location, construction, and convenient use of its railway, and may also take, remove, and use for the construction and repair of said railway and its appurtenances, any earth, gravel, stone, timber, or other materials, on or from the land so taken; the land so taken otherwise than by the consent of the owners, shall not exceed one hundred feet in width, except for wood and water stations, unless where greater width is necessary for excavation, embankment, or depositing waste earth. [R., § 1314.]

Provisions constitutional. The use for which land appropriated for a right of way is taken is a public one although it is for private profit, and the provisions authorizing the taking of private property for such purpose upon compensation being made are therefore constitutional. *Stewart v. Board of Supervisors*, 30-9.

Nature and extent of right. The railway company procuring the right of way is the owner of its right of way so long as it is used for railway purposes, and the owner of the land taken has no right to go thereon for the construction of fences or other purposes. *Heskett v. Wabash, St. L. & P. R. Co.*, 41-467.

The company may take, remove and use for the construction and repair of its railway and appurtenances any earth, gravel, stone, timber or other material on or from the land condemned, and is not limited as to the quantity of such materials to be used in the construction and repair of its road. The limitation to so much as is necessary implied under this section relates to the quantity of land to be taken. *Winklemans v. Des Moines N. W. R. Co.*, 62-11.

It would seem that the company may sink wells on its right of way, for the purpose of supplying its engines with water, and would not be liable in damages for thus diverting percolating water from a spring upon the adjoining land of the person granting the right of way. *Hougan v. Milwaukee & St. P. R. Co.*, 35-558.

Timber standing upon the property taken for right of way, other than that necessary for the construction of the railway, remains the property of the owner of the land. *Preston v. Dubuque & P. R. Co.*, 11-15.

The statute by express language authorizes the taking of material for the construction and use of the railway, but under a right of way deed granting an easement "for all purposes connected with the construction, use and occupation of the railway," *held*, that the railway company was not authorized to take sand for use in constructing a roundhouse, but the owner might take such sand so far as not interfering with the use of the land for railroad purposes. *Vermilya v. Chicago, M. & St. P. R. Co.*, 66-606.

By the condemnation proceedings a corporation requires the right to the exclusive use of the surface of the land, and the condemnation is made on the theory that this use of the surface will be perpetual. *Hollingsworth v. Des Moines & St. L. R. Co.*, 63-443; *Cummings v. Des Moines & St. L. R. Co.*, 63-397; *Clayton v. Chicago, I. & D. R Co.*, 67-238.

The conveyance to a railway of a right of way conveys only an easement. *Brown v. Young*, 69-625.

Constitutes an incumbrance. The right of way over land for a railway is an incumbrance for which a grantee of land may recover on a covenant against incumbrances, although he knew of the existence of such right

of way at the time of purchasing. *Barlow v. McKinley*, 24-69; *Jerald v. Elly*, 51-321; *Flynn v. Whitebreast Coal, etc, Co.*, 72-738.

For the mere use and exercise of a right of way over the property is not sufficient to establish such right or raise a presumption of its existence. *Jerald v. Elly*, 51-321.

Subject to foreclosure proceedings. Where a railway company takes a deed for a right of way, and enters into possession pending foreclosure proceedings against the property, it is bound by decree and sale thereunder, though not made a party. *Jackson v. Centerville, M. & A. R. Co.*, 64-292.

Width which may be taken. Under the statutory provision allowing the condemnation of a strip of land one hundred feet in width, the company is not limited to fifty feet on each side of its track, but the track may be located anywhere on the tract taken. *Stark v. Sioux City & P. R. Co.*, 43-501.

Additional width. Where a company has the power to build an additional lateral road auxiliary to the original road, the construction and maintenance of which is possible only upon an independent right of way, the right of way statute, limiting the width of right of way to one hundred feet, does not prevent the condemnation of land for such additional road; and the same power may be exercised by another corporation, even though it derives all its means from the first, and builds the road with the express design of leasing it. *Lower v. Chicago, B. & Q. R. Co.*, 59-563.

Where a company entered into possession of and constructed its road over a right of way thirty feet in width acquired by deed, and subsequent proceedings to condemn a right of way seventy feet wide were instituted, *held*, that the subsequent proceedings must be considered as intended to secure a right of way in addition to that acquired by deed. *Gray v. Burlington & M. R. R. Co.*, 37-119.

When a railway company applies for a hundred feet or less in width for a right of way, it must be conclusively presumed that the amount applied for is necessary, and the fact that the company owns land on one side of such right of way will not limit the amount which it may condemn. *Stark v. Sioux City & P. R. Co.*, 43-501.

As to additional width for depot purposes, see § 1907.

Use by another road. Where right of way over land has been acquired by one railroad the owner cannot have an injunction against another road for using such right of way under agreement with the road to which it belongs. *Holbert v. St. Louis, K. C. & N. R. Co.*, 38-315.

Appropriation of right of way by another company. The easement acquired by a railroad company is acquired to public use, and is in the nature of a grant from the state for the uses and purposes provided by law, and when the company fails to carry out the purposes of the grant, the legislature may transfer the easement to another company upon making compensation to the former company. *Noll v. Dubuque, B. & M. R. Co.*, 32-66; *Central Iowa R. Co. v. Moulton & A. R. Co.*, 57-249.

Transfer to another road. Where a right of way has been deeded to one railway company in consideration of the benefit to be derived from the construction of its line, such right of way cannot be transferred by that company to another proposing to construct a different line not running in the same direction. *Crosbie v. Chicago, I. & D. R. Co.*, 62-189.

Who entitled to Condemn. It is sufficient under the statute to allege that the party seeking to obtain a right of way is a corporation duly organized, and engaged in building a railroad. *Chicago N. & S. W. R. Co. v. Mayor of Newton*, 36-299.

A foreign corporation could not, before the amendment of this section, procure right of way condemnation proceedings, and might be restrained by injunction from using property for right of way until the right was in some other manner procured. *Holbert v. St. Louis, K. C. & N. R. Co.*, 45-23.

Before the change in the statute allowing foreign corporations to condemn land for right of way, *held*, that where nothing appeared to the contrary it would be presumed that the condemnation was properly made on behalf of a corporation duly authorized to institute the proceedings. *Kostendader v. Pierce*, 37-645.

Horse Railways. The provisions for condemning right of way for the use of railway companies are applicable to railways operated by animal power as well as those operated by steam. *Clinton v. Clinton & L. H. R. Co.*, 37-61.

Railways in cities. By § 623 the method of assessing damages for right of way is made applicable to damages caused to abutting owners from the construction of a railway upon the streets of a city, and such proceedings can be instituted only by the company and not by the property owner, who may have an action for damages without regard to the method of assessment thus provided. *Mulholland v. Des Moines, A. & W. R. Co.*, 60-740.

Further as to the rights of railway companies to construct their tracks over the streets of cities and towns, see notes to § 623.

Parol license. Where the company by parol license enters upon ground to construct its railway the subsequent payment of the damage assessed gives it easement by contract, which, though arising upon parol, cannot be revoked. *Slocum v. Chicago, B. & Q. R. Co.*, 57-675.

In such case a subsequent purchaser takes subject to the right of way, whatever it is, if it does not exceed the statutory width, and cannot set up non-user by the company of a portion, and adverse possession thereof, to defeat its rights. *Ibid.*

Presumption. Where a railway company is conceded to be in rightful possession of a right of way it will be presumed that it has an easement acquired either by condemnation or purchase. *Drake v. Chicago, R. I. & P. R. Co.*, 63-302.

Subsequent condemnation. Where the compensation for the right of way has not only been agreed upon, but also paid to the land owner by the corporation, and he has conveyed the right of way, proceedings to condemn such right of way cannot be instituted, and would be entirely void for want of jurisdiction. *Council Bluffs & St. L. R. Co. v. Bentley*, 62-446.

In an action against a railroad by an adjacent owner for damages for the occupation of a street in which such adjacent owner holds the fee, it is error to reject a deed from such owner to the company for right of way over his premises. *Frith v. Dubuque*, 45-406.

The occupation of premises taken for right of way cannot be enjoined for failure to pay therefor under proceedings which have been declared void where the company has a deed granting it a right of way substantially the same as that occupied. *Bentley v. Wabash, St. L. & P. R. Co.*, 61-229.

Where a railway company having a right of way thirty feet in width instituted proceedings to condemn a right of way seventy feet in width, *held*, that such proceedings must be considered as intended to secure an additional right of way, and that payment of the damages assessed in such proceedings did not cancel the obligation entered into by the company in accepting the deed. *Gray v. Burlington & M. R. R. Co.*, 37-119.

1905. For reservoirs. 1242. It may, also, take and hold additional real estate as its water-stations, for the purpose of constructing dams and forming reservoirs of water to supply its engines. Such real estate shall, if the owner requests it, be set apart in a square or rectangle shape, including all the overflowed land, by the commissioners as hereafter provided; but the owner of the land shall not be deprived of access to the water or the use thereof in common with the company on his own land. And the dwelling-house, out-house, orchards, and gardens of any person shall not be overflowed or otherwise injuriously affected by any proceeding under this section. [12 G. A., ch. 117, § 1.]

1906. For pipes. 1243. Any such railway corporation may lay down pipes through any land adjoining the track of the railway, not to a greater distance than three-fourths of a mile therefrom, unless by consent of the owners of the land through which the pipes may pass beyond that distance, and maintain and repair such pipes, and thereby conduct water for the supply of its

engines from any running stream; and shall, without unneccessary delay, after laying down or repairing such pipes, cover the same so as to restore the surface of the land through which they may pass to its natural grade; and shall, as soon as practicable, replace any fence that it may be necessary to open in laying down or repairing such pipes; and the owner of the land through which the same may be laid, shall have a right to use the land through which such pipes pass in any manner so as not to interfere therewith; said pipes shall not be laid to any spring, nor be used so as to injuriously withdraw the water from any farm; *provided*, that such corporation shall be liable to the owner of any such lands for any damages occasioned by laying down, regulating, keeping open, or repairing such pipes, such damages to be recoverable from time to time as they may accrue in any ordinary action in any court of competent jurisdiction. [Same § 2.]

1907. For additional depot grounds. 20 G. A., ch. 190, § 1. Any railway corporation owning or operating a completed railway in the state of Iowa, shall have power to condemn lands for necessary additional depot grounds in the same manner as is provided by law for the condemnation of the right of way: *Provided*, that before any proceedings shall be instituted to condemn such additional grounds, the railway company shall apply to the railway commissioners, who shall give notice to the land owner and examine into the matter and report by certificate to the clerk of the circuit [district] court in the city in which the land is situated, the amount and description of the additional lands necessary for the reasonable transaction of the business, present and prospective, of such railway company. Whereupon said railway company shall have power to condemn the lands so certified by the commissioners.

Under this act the railroad commissioners have jurisdiction or power to determine in a proper case what quantity of land may be condemned for additional depot grounds, and it is for them to determine how much land is necessary for the proper use of the company, the necessity for a station at that point, and all other questions pertaining thereto. *Jager v. Dey*, 80-23.

The expression "necessary depot grounds" means such land in addition to that already acquired, as may be necessary for depot purposes, and this may be in addition to the regular right of way, as well as in addition to other land already taken for depot purposes. *Ibid.*

Under a previous statute, *held*, that a company had no right to condemn additional land for depot grounds, and that therefore any proceeding for that purpose might be enjoined. *Forbes v. Delashmutt*, 68-164.

MANNER OF CONDEMNATION.

1908. Sheriff's Jury; damages assessed. 1244. If the owner of any real estate, necessary to be taken for either of the purposes mentioned in the three preceding sections [§§ 1904-1906], refuse to grant the right of way, or other necessary interest in said real estate required for such purposes, or, if the owner and the corporation cannot agree upon the compensation to be paid for the same, the sheriff of the county in which said real estate may be situated, shall, upon the application of either party, appoint six disinterested free-holders of said county, not interested in a like question, who shall inspect said real estate and assess the damages which said owner will sustain by the appropriation of his land for the use of said corporation, and make report in writing to the sheriff of said county, and if said corporation shall,

at any time before it enters upon said real estate for the purpose of constructing said railway, pay to said sheriff for the use of said owner, the sum so assessed and returned to him as aforesaid, it may construct and maintain its railway over and across such premises. [R., § 1317; 12 G. A., ch. 117, § 3.]

Measure of damages. The damages contemplated are the "just compensation" provided for by Const., art. 1., § 18. The owner is to have a fair equivalent in money for the injury done him by the taking of his property. It is the right of way which is appropriated, not the fee in the land; but the right of way is such as is peculiar to a railroad, and is the right to all freedom in locating, constructing, using and repairing such road and its appurtenances, and taking and using for that purpose only, any earth, gravel, stone, timber, etc., on or from the timber taken, and the right to make cuts, embankments, etc., and includes the rights incident to rapid locomotion as against the owner of the fee. It seems that the right of way is intended to be in perpetuity. *Henry v. Dubuque & P. R. Co.*, 2-288.

The question as to the proper measure of damages in such cases discussed and the true measure declared to be the difference between the market value of the land entire, and its market value after the right of way is carved out. *Ibid.; Sater v. Burlington, etc., Plank Road Co.*, 1-386.

The amount of damages to be allowed is what will compensate plaintiff for the appropriation of the right of way. It may be more or less than the value of the property taken. *Gear v. Chicago, C. & D. R. Co.*, 39-23.

Where the damages to a leasehold estate are to be assessed, the proper measure of damages is the difference in value of the annual use of the property, before taking and after. *Renwick v. Davenport & N. W. R. Co.*, 49-664.

Recovery by a property owner is not limited to the damage which he would sustain if the property were to be used only for the purpose to which it is devoted when such proceedings are had, but the value of the property for any purpose for which it is valuable may be considered. Therefore the fact that a land is underlaid with coal may properly be shown. *Doud v. Mason City & Ft. D. R. Co.*, 76-438.

The land owner is entitled to the full and fair value of the land appropriated, and, in addition thereto, to such sum as will compensate him for the depreciation in value of his adjoining land by reason of the right of way, irrespective of any benefits of the road to the land; but the speculative, contingent or future damages, not affecting the market value cannot be allowed. *Smalley v. Iowa Pacific R. Co.*, 36-571.

The value of the right of way may be shown as an element of damage. *Pingery v. Cherokee & D. R. Co.*, 78-438.

The value of growing crops upon the right of may be considered in assessing the compensation. *Lance v. Chicago, M. & St. P. R. Co.*, 57-636.

Increased danger of injury to or destruction of the property by reason of exposure to fire or other dangers incident to the operation of a railroad are elements of damage for which compensation should be made. *Small v. Chicago, R. I. & P. R. Co.*, 50-338; 344; *Dreher v. Iowa Southwestern R. Co.* 59-599.

It is error to take into account the value of specific property, such as a grove or house, which might be destroyed by fire. *Lance v. Chicago, M. & St. P. R. Co.*, 57-636.

It may be shown that the market value of the farm crossed by the right of way will be less on account of danger from fire or other such causes. *Dudley v. Minnesota & N. W. R. Co.*, 77-408.

But evidence as to the effect that the building of the road will have on the rate of insurance to buildings on premises is not admissible. *Pingery v. Cherokee & D. R. Co.*, 78-438.

The question whether, because of the construction of the road, the land is made more wet than it otherwise would be is a proper one, it not being sought to show that such damages were a result of the improper construction of the road. *Britton v. Des Moines, O. & S. R. Co.*, 59-540.

The fact that the road-bed is constructed in a cut is a proper fact to be shown in estimating damages. *Cummins v. Des Moines & St. L. R. Co.*, 63-397.

While the land owner is not entitled to prove the proximity of the depot or the number of tracks as independent elements of damage, yet such evidence may be admissible in determining the extent to which the company would probably use the ground taken in carrying on its business. *Ibid.*

As the company acquires the right to occupy and use the whole of the right of way, it cannot have the damage assessed on the theory that it will in fact use but part, and therefore that the occupation of buildings situated upon the right of way will not be disturbed. *Ibid.*

Unless it appears that the reversionary right of the land owner is of some value, as, for instance, by reason of the land being underlaid by coal or mineral, it is not error to disregard such reversionary interest and assess the damages at the market value of the land taken. *Ibid.; Hollingsworth v. Des Moines & St. L. R. Co.*, 63-443.

The company may take, remove and use for the construction and repair of its railway and appurtenances any earth, gravel, stone, timber or any other material on or from the land condemned, and is not limited as to the quantity of such materials to be used in the construction and repair of its road. The limitation to so much as is necessary implied under this section relates to the quantity of land to be taken. *Winklemans v. Des Moines N. W. R. Co.*, 62-11.

Although the right of way taken is an easement and the fee remains in the owner, yet unless it is made to appear that the fee burdened with the easement is of some determinative value, the assessment of damages should be based on the full value of the land actually taken, and it is not error to refuse to instruct the jury on the theory that the fee remains in the owner, and that at some time in the future the land may cease to be used for railway purposes and revert to such owner. *Clayton v. Chicago, I. & D. R. Co.*, 67-238.

Where a railway company was seeking to condemn a right of way between the property of a riparian owner and the Mississippi river, *held*, that the owner was entitled to damages caused to an embankment constructed by him extending out to a crib in the river. *Renwick v. Davenport & N. W. R. Co.*, 49-664.

The owner is not invested with the right to cross the right of way after its appropriation at his pleasure. Whatever right he has in that respect is subservient to that of the company using the road for the running of its trains. *Ibid.*

The question of the right of passage, as affected by the taking of the right of way, may be considered as bearing upon the damages. *Bell v. Chicago, B. & Q. R. Co.*, 74-343.

Various items of damage *held* property taken into account, by a witness in testifying as to the market value of land after taking the right of way. *Smalley v. Iowa Pacific R. Co.*, 36-571.

It is not admissible to prove the character of netting or screens used in the smoke-stacks of the engines of the company seeking to take the right of way. Damages could not be assessed on the basis that the company would continue to use such screens. *Pingery v. Cherokee & D. R. Co.*, 78-438.

An instruction that in dertermining the damages the jury should not consider whether the defendant company has or has not refused, or will or will not furnish proper and suitable crossings, *held* proper. *Ibid.*

The prices at which other lands in the vicinity of the premises had been sold about the time of the commencement of the proceedings is not receivable in the absence of evidence that there was any similarity between the lots in question and those which it was claimed had been sold. *Cummins v. Des Moines & St. L. R. Co.*, 63-397; *Hollingsworth v. Des Moines & St. L. R. Co.*, 63-443.

It is proper for the court to state the law governing damages in such cases as found in the constitution and statutes of the state, no matter what evidence is introduced. *Ball v. Keokuk & N. W. R. Co.*, 74-132.

Market value. In determining the damages the proper rule is to first ascertain the fair market value of the premises over which the proposed improvement is to pass, irrespective of the improvement, and also the like value of the same in the condition in which the premises will be after the land for the improvement has been taken, irrespective of the benefit which will result from the improvement, and the difference in value will constitute the measure of compensation. *Sater v. Burlington, etc., Plank Road Co.*, 1-386.

The owner may be a witness generally as to the value of the land before and after appropriation, leaving the opposite party, by his right of cross-examination, to learn the ability of the witness to judge in the premises and what he takes into consideration in making up his judgment. *Ibid.*

In determining the amount of damage the witness may be allowed to testify as to the value immediately before the right of way was taken and immediately after, not taking into consideration the benefit to the land. *Harrison v. Iowa Midland R. Co.*, 36-323.

The opinion of a witness as to the value before taking is admissible. *Henry v. Dubuque & P. R. Co.*, 2-288, 311.

It is not competent to prove the assessed valuation of property, although the assessor may be a competent witness he must be introduced as such. *Dudly v. Minnesota & N. W R. Co*, 77-408.

It is usual to take the testimony of the witness upon questions of the value of property when he states under oath that he knows its value or that he knows the value of like property. *Ball v. Keokuk & N. W. R. Co.*, 74-132.

It is not proper in such proceedings to show by evidence at what price the purchase of right of way from adjoining tracts has been secured, unless it is shown that such tracts were of like character or that the right of way had a uniform and marketable value in that neighborhood. *King v. Iowa Midland R. Co.*, 34-458.

In ascertaining the damages to land used, improved and occupied together as one farm, witnesses cannot be asked as to the value of detached parcels. *Winklemans v. Des Moines N. W. R. Co.*, 62-11.

Witnesses who were jurors for the assessment of damages in the first instance cannot be required to state on a trial of the case on appeal whether their report of the assessment made to the sheriff correctly expressed their judgment as to the amount of damages sustained. *Ibid.*

The fact that on the prior assessment the land owner made no claim for damages which were afterward assessed upon appeal, *held* not objectionable, as it did not appear on the original assessment that such damages would result from the taking of the right of way. *Ibid.*

While it is competent to show the situation and general surroundings of the land, its character and the roads leading thereto, etc., yet where the land was situated beyond the limits of the city and was not in the market as residence property, *held*, that evidence as to the character of improvements being made upon the street leading toward the land, but which would not if extended come within eighty yards of it, was improper in determining the damages caused to the land. *La Mont v. St. Louis, D. M. & N. R. Co.*, 62-193.

The inquiry is not as to any special value of the property to the owner growing out of ownership of other distinct and separate property, nor that of the particular premises over which the road passes as intended to be put in the future to a particular use in connection with other distinct and separate pieces of land. Regard must be had to the immediate and not the remote damages of the appropriation. *Fleming v. Chicago D. & M. R. Co.*, 34-353.

Evidence of increased fire risk in connection with the use of the premises intended to be made in the future cannot be taken into account. *Ibid.*

Entire premises. Damages to the entire premises necessarily and properly used by the owner in his business should be estimated, although such premises are divided by a street or highway. *Renwick v. Davenport & N. W. R. Co.*, 49-664.

Where the right of way passes through a farm the owner may show as damages depreciation in value of the whole farm, and is not limited to the damages to the governmental subdivision through which the road runs.

Hartshorn v. Burlington, C. R. & N. R. Co., 52–613; *Ham v. Wisconsin, I. & N. R. Co.*, 61–716.

Where two lots are improved and used as one property and a notice of proceedings to condemn a right of way to one lot only is given, and the right of way is taken entirely from such lot, nevertheless the commissioners may properly include both lots in their assessment and return. *Cummins v. Des Moines & St. L. R. Co.*, 63–397.

In such cases it will be presumed that the title to both lots is in the owner against whom the proceedings with reference to one lot is instituted, without proof on his part of that fact, the finding of the commissioners as to the ownership of the property not having been questioned on appeal. *Ibid.*

If a railway company applies to have the damages assessed, and, in its application, designates the land known as the farm of the adverse party, or if the jury is called under an agreement of both parties, and it is therein specified that the damages to the land owner in consequence of the location across his farm shall be assessed, the railway company will afterwards be estopped from confining the assessment to the immediate portion of land over which the railroad crosses, and also from denying defendant's ownership of such land, the damages to which they have agreed shall be assessed. *Mississippi & M. R. Co. v. Byington*, 14–572.

Where different portions of land belonging to the same owner were adapted to different uses, and only one of such portions was crossed by the right of way, *held*, that the portion not crossed could not be taken into consideration in determining the damages. *Haines v. St. Louis, D. M. & N. R. Co.*, 65–216.

Where blocks of lots belong to one owner, he is not limited in his damages to the injury to the particular lots crossed, but may recover for the damage to all the lots in the block, whether touched by the right of way or not. *Cox v. Mason City & Ft. D. R. Co.*, 77–20.

Cost of fencing. The cost of building additional fence and keeping the same in repair should not be allowed as part of the damages. *Henry v. Dubuque & P. R. Co.*, 2–288; *Kennedy v. Dubuque & P. R. Co.*, 2–521; *Hanrahan v. Fox*, 47–102.

Although the cost of fencing is not to be taken directly into account, yet, if the land was before fenced, and, by the taking of the right of way, it is thrown open and left in a manner unfenced, this fact will be taken into consideration in arriving at the depreciated value of the remaining premises. *Henry v. Dubuque & P. R. Co.*, 2–288, 310.

Damages for improper construction. The damages to be awarded include those only from the appropriation and lawful use of the premises taken, and do not embrace injuries which may result from unlawful acts for which the company would be liable to the party injured. *Fleming v. Chicago, D. & M. R. Co.*, 34–353.

Damages consequent upon the negligent construction of the road are not to be considered. Only such damages are to be included as arise from its proper construction. *King v. Iowa Midland R. Co.*, 34–458; *Miller v. Keokuk & D. M. R. Co.*, 63–680.

Obstruction of highway. The obstruction of a public highway is not a proper element of compensation to the owner of the property in this proceeding. *Gear v. Chicago, C. & D. R. Co.*, 43–83; *Fleming v. Chicago, D. & M. R. Co.*, 34–353.

Trespass. If a subcontractor in constructing the road, without authority from the company, goes outside of the right of way and commits trespass on land not condemned, the company is not thereby rendered liable. In order to render the company liable it must be made to appear, in some way, that it consented to the trespass or had such knowledge of it at the time it was done that its consent might be presumed. *Waltemeyer v. Wisconsin, I. & N. R. Co.*, 71–626.

Diversion of water-course, etc. The right which the owner of land has to a water-course flowing over it is a freehold right which cannot be taken from him for public use either directly or by diminution or diversion from its natural channel, without adequate compensation. *McCord v. High*, 24–336.

The fact that a right of way is asked across land crossed by a stream of water does not authorize the assessment of damages for diversion of the stream from its natural channel when such diversion would not be absolutely necessary. The mere fact that such diversion would be convenient or advantageous in the construction of the road will not authorize the implication that the company desires to acquire the right to make such diversion and pay the damage therefor rather than construct its road by bridging or otherwise, so as to render such diversion unnecessary. *Stodghill v. Chiaago, B. & Q. R. Co.*, 42-26.

The right to obstruct the passage of surface water is not presumed to be acquired in a condemnation proceeding, and the damages assessed do not cover damages resulting from such stoppage. The owner is not presumed to have been paid therefor, upon the theory that the company preferred to protect him against this incidental injury, and the enjoyment of the easement carries with it from day to day the obligation to furnish this protection. *Drake v. Chicago, R. I. & P. R. Co.*, 63-302. And see *S. C.*, 70-59.

Interference with wells. Where a railway company had acquired right of way over land, *held*, that in connection with such right of way it might dig wells and would not be liable for thereby interfering with the percolation of water supplying springs upon the premises of the land owner. *Hougan v. Milwaukee & St. P. R. Co.*, 35-558.

The fact that the construction of a railway destroys a valuable spring may be shown in the evidence in determining the amount of damages. It will not be presumed that the spring was unnecessarily destroyed in the absence of evidence to that effect. *Winklemans v. Des Moines N. W. R. Co.*, 62-11.

Consequential damages. Regard must be had only to the immediate and not to the remote consequences of the appropriation. The value of the remaining premises is not to be depreciated by heaping consequence on consequence. *Sater v. Burlington, etc., Plank Road Co.*, 1-386.

Damages are not limited to the value of the land taken, but include such damages as result proximately from the use for which it is taken. *Kucheman v. Chicago, C. & D. R. Co.*, 46-366, 376.

Obstructing a view or interfering with the owners privacy, and the noises of approaching trains, are matters for which the land owners may have compensation. As to such matters he is not injured merely as a member of the community in general. *Ham v. Wisconsin, I. & N. R. Co.*, 61-716.

Evidence in regard to how the railroad affects a farm over which it passes, aside from the mere value of the land taken, is admissible. *Dreher v. Iowa Southern R. Co.*, 59-599.

Incidental injury from smoke and dust and the noise of moving trains gives no right for the recovery of damages where there is no other injury to which the smoke, etc., is incident. So *held* where the land condemned had not yet been actually occupied or interferred with by the railway company. *Dimmick v. Council Bluffs & St. L. R. Co.*, 58-637.

Damages not connected with the taking of land. Whatever inconveniences a property owner may suffer by the construction of a railway upon the property of another, no carelessness or negligence in such construction appearing, such injuries will not entitle such property owner to compensation in damages. *Barr v. Oskaloosa*, 45-275.

When assessment proper. While the statute only contemplates an assessment where the owner refuses to grant the right of way, or when the parties cannot agree as to the compensation, yet where it appears that the land owner contests the right of the company to take his land on the terms fixed by the appraisers and attacks the regularity of the proceedings of such appraisers, and that the appraisers were only to assess damages in cases where the owners had refused to grant the right of way, *held*, that the refusal to grant the right of way sufficiently appeared to show the jurisdiction of the court. *Mississippi & M. R. Co. v. Rosseau*, 8-373.

Where the compensation for the right of way has not only been agreed upon, but also paid to the land owner by the corporation, and he has conveyed the right of way, proceedings to condemn such right of way cannot be instituted, and would be entirely void for want of jurisdiction. *Council Bluffs & St. L. R. Co. v. Bentley*, 62-446.

The phrase "owner of any real estate" includes a mortgage, and if not made a party to the proceedings he is not bound thereby. *Severin v. Cole*, 38-463.

This section refers to land taken and appropriated for right of way. The provisions of § 623, with reference to assessing damages to the abutting property owner by reason of the construction of a railroad track along the streets of a city, do not authorize such abutting property owner to have his damages assessed in this manner. *Stough v. Chicago & N. W. R. Co.*, 71-641.

Respective interests of joint owners. Where the respective interests of tenants in common appear of record or can be conveniently ascertained, the company, if it applies for the appointment of commissioners to assess damages should by its application cause such damages to be assessed separately to each owner. *Ruppert v. Chicago, O. & St. J. R. Co.*, 43-490.

A sheriff's jury cannot apportion the damages between the owner and the person holding a mortgage upon the land. They are to estimate the right of way only, and where the mortgagee is not made a party he may voluntarily assert his right to the money in the hands of the sheriff. *Sawyer v. Landers*, 56-422.

Enforcement of Payment. Where it had been agreed that the compensation to be paid for the right of way should be fixed by a third person, and under such agreement the railway company went into possession, but the amount of compensation was never fixed, *held*, that the land owner might, by condemnation proceedings, enforce payment of the compensation to which he was entitled. *Corbin v. Wisconsin, I. & N. R. Co.*, 66-269.

The agreement between the parties in such case as to the amount of damages might be interposed as a defense to the claim for damages in excess of the amount agreed upon, but such agreement need not be specially pleaded. *Ibid.*

New assessment. Where, upon condemnation of a right of way over agricultural college land, the damages assessed were deposited with the sheriff, *held*, that without return of the amount thus deposited the grantee of the land could not have another assessment of damages for the use of the premises by another railway company without a return of the money thus deposited. *Chicago, M. & St. P. R. Co. v. Bean*, 69-257.

Even though the land owner is seeking to set aside a deed previously made, on the ground of fraud or otherwise, he cannot disregard the previous transaction and have a new assessment. *Council Bluffs & St. L. R. o. v. Bentley*, 62-446.

A land owner who has received compensation which has not been refunded by him cannot recover the second time. *Dubuque & D. R. Co. v. Diehl*, 64-635.

Homestead exemption. Damages assessed for a right of way over the homestead are exempt from execution to the same extent that the homestead is. *Kaiser v. Seaton*, 62-463.

Liability of commissioners. The commissioners should not be put to costs for doing in a regular and legal way what they are required to do, and in a *certiorari* proceeding to review their action an answer setting out the notice in the proceeding under which they are acting is sufficient. *Forbes v. Delashmutt*, 68-164.

Dismissal of proceedings. Where the company has not entered upon the land to construct the road, no right to the amount of damages assessed becomes vested in the land owner until the decision on the appeal, and pending the appeal the company may dismiss the proceedings *Burlington & M. R. Co. v. Sater*, 1-421.

A proceeding for the condemnation of land for a railway simply fixes the price upon payment of which, within a reasonable time, the company may take the right of way. The company cannot be compelled to pay the damages and take the way, but may waive the rights acquired by the proceedings, being liable, however, for costs and for any damages actually suffered by the land owner. *Gear v. Dubuque & S. C. R. Co.*, 20-523.

Judgment for the amount of damages, even though entered in the usual form of a judgment in an action of debt, passes no title to the company be-

fore payment, nor does it compel the acceptance of, or payment for the land. *Ibid.*

Where, in proceedings to assess the damages for a right of way already occupied, the amount assessed is paid to the sheriff, and an appeal is afterwards taken, the railroad company cannot, by abandoning its right of way, defeat the land owner's right to the amount so paid, but such abandonment may be considered in determining the damages to which the land owner shall be entitled upon the trial of such appeal, and it would be error to enter a judgment for additional damages contingent upon the re-occupation of the land by the company; and *held*, that such re-occupation should not be made without a new assessment of damages. *Hastings v. Burlington & M. R. R. Co.*, 38-316.

A proceeding instituted by a railway company to condemn a right of way may be dismissed as any other action without prejudice, and will not defeat a subsequent proceeding of the same character to condemn the right of way over such property. *Corbin v. Cedar Rapids, I. F. & N. W. R. Co.*, 66-73.

Remedies of land owner. The proceedings may be instituted by the land owner after the railway is completed. *Hibbs v. Chicago & S. W. R. Co.*, 39-340.

The method provided for ascertaining and compelling the payment of the damages is exclusive, and none other can be pursued. But the owner is not deprived of his right to bring action for the possession of his property when taken without compensation. *Daniels v. Chicago & N. W. R. Co.*, 35-129.

A party has, by appeal, an adequate remedy against any irregularities which may occur in the proceedings or any injustice which may be done him in the award, and if he has personal notice this remedy is exclusive as to all such matters, and he cannot rely upon irregularities as a ground for restraining the construction of the road in accordance with such proceedings. *Phillips v. Watson*, 63-28.

If the company enters upon the land before the damages are paid it may be treated as a tresspasser. The owner is not compelled to resort to an injunction or an action for the amount. *Henry v. Dubuque & P. R. Co.*, 10-540.

Where the occupancy of a right of way is commenced and continued without right, the company is a mere trespasser, and the land owner or his grantee may maintain an action for damages for the occupation of the land. *Donald v. St. Louis, K. C. & N. R. Co.*, 52-411.

If the company enters before payment of the damages assessed it may be held liable in damages as for a tort. *Dimmick v. Council Bluffs & St. L. R. Co.*, 62-409.

In action to recover possession of land occupied without condemnation by the company, plaintiff may recover damages for the use of the premises. It is not necessary that such damages be assessed in a condemnation proceeding. *Birge v. Chicago, M. & St. P. R. Co.*, 65-440; *Rush v. Burlington, C. R. & N. R. Co.*, 57-201.

On failure of the company which is already in possession and use of the premises for right of way to pay the amount assessed, it may be restrained by injunction from further using the premises. *Henry v. Dubuque & P. R. Co.*, 10-540; *Richards v. Des Moines Valley R. Co.*, 18-259.

The same right to an injunction will accrue to the land owner in case he institutes proceedings for assessing the damages. *Hibbs v. Chicago & S. W. R. Co.*, 39-340.

The land owner is not estopped from maintaining proceedings to recover compensation for land taken for right of way by the fact that he has allowed the railway company to go upon and use his land for that purpose, and make improvements thereon. *Ibid.*

In such cases he may maintain an injunction restraining defendant from further using the right of way without making compensation, or maintaining ejectment for the possession of the premises, if it appears that damages have been assessed and nothing but payment is wanting to entitle the company to the continued use of its right of way. It is proper to provide that no execution for the possession of the premises under such circumstances

shall issue in the action of ejectment if the damages are paid within a limited time. *Conger v. Burlington & S. W. R. Co.*, 41-419.

By agreement of parties an appeal was taken from the assessment of damages and judgment for the amount assessed was entered in such appeal, and execution thereon was stayed for two years, and the railroad was constructed through the property without objection. *Held*, that upon failure to pay the amount of the judgment at the time specified, the owner could proceed by injunction to restrain any further use of his property until compensation should be made. *Irish v. Burlington & S. W. R. Co.*, 44-380.

A railway company may be dispossessed of its right of way by a judicial sale in a proceeding to enforce the land owner's right. So *held* where the owner of land had agreed to give the right of way in consideration of the performance of certain conditions by the company which had not been performed, and action was brought by the owner to foreclose his vendor's lien. Also, *held*, that the vendor's lien in such case was superior to the title of the purchaser of the railroad at foreclosure sale. *Varner v. St. Louis & C. R. R. Co.*, 55-677.

All questions involving the ownership of the right of way can be considered and determined in the condemnation proceedings, and a court of equity will not interfere to restrain the prosecution of such proceedings on account of a claim that the right to damages is barred or has been abandoned. *Keokuk & N. W. R. Co. v. Donnell*, 77-221.

Deposit of Damages assessed. The fact that the company deposits the sum found due with the sheriff will not prevent the land owner from recovering, on appeal, the actual damage to the property and interest thereon from the time it is taken, even though the amount of the original damages is found to be less than that assessed by the sheriff's jury. *Noble v. Des Moines & St. L. R. Co.*, 61-637.

The sheriff, in receiving the money deposited as security cannot be regarded as the agent of the owner, but he is the agent of the railway company, and if, through the unfaithfulness or mistake of the sheriff, the money is lost before reaching the hands of the land owner, such loss does not fall upon him but upon the company making the deposit. *White v. Wabash, St. L. & P. R. Co.*, 64-281.

For moneys paid to a sheriff by the company the land owner may maintain action against him at any time after the expiration of the thirty days allowed for appeal. The statute of limitations, therefore, run against such an action from that time, and the fact that the land owner has refused the money and attempted by injunction to restrain the taking of his land will not prevent the running of the statute. *Lower v. Miller*, 66-408.

1909. Application; notice. 1245. The application to the sheriff shall be in writing, and the free-holders appointed shall be the commissioners to assess all damages to the owners of real estate in said county and said corporation, or the owner of any land therein, may at any time after their appointment, have the damages assessed in the manner therein prescribed by giving the other party five days' notice thereof in writing, specifying therein the day and hour when such commissioners will view the premises, which shall be served in the same manner as original notices. [R., § 1318.]

Where a mortgage upon the property appears of record, notice must be given to the mortgagee, or he will not be bound by the proceedings. *Severin v. Cole*, 38-463. And see *Cochran v. Independent School Dist.*, 50-663.

Where the proceedings are based upon the assumption that the owner is a non-resident and unknown, such assumption will be deemed true on *certiorari* unless the contrary is made to appear. *Everett v. Cedar Rapids & M. R. R. Co.*, 28-417.

The notice must name the person whose land is affected by the proceedings. It is not sufficient that it be directed to all persons having an interest in certain described property. *Birge v. Chicago, M. & St. P. R. Co.*, 65-440.

Where a right of way over agricultural college land in possession of a lessee was condemned in proceedings to which the college was a party, and

afterwards, the lessee's right being forfeited, the premises were sold to another, *held* that the condemnation preceedings were binding on the subsequent purchaser of the premises. *Chicago, M. & St. P. R. Co. v. Bean*, 69–257.

The application need not describe the entire premises which are to be considered in estimating the damages. See Notes to § 1918.

1910. Minor or insane owner. 1246. If the owner of any lands is a minor, insane or other person under guardianship, the guardian of such minor, insane or other person, may, under the direction of the circuit [district] judge, agree and settle with said corporation for all damages by reason of the taking of such lands for any of the purposes aforesaid, and may give valid conveyances of such land. [R., § 1316.]

1911. Non-resident owner. 1247. If the owner of such lands is a non-resident of the county in which the same are situated, no demand of the right of way or other purpose for which such lands are desired, shall be necessary, except the publication of a notice which may be in the following form:

NOTICE.—For the appropriation of lands for railway purposes. To (here name each person whose land is to be taken or affected,) and all other persons having an interest in, or owning any of the following real estate (here describe the land by its congressional numbers in tracts not exceeding one-sixteenth of a section, or, if the land consists of lots in a town or city, by the numbers of the lot and block). You are hereby notified that the ——— has located its railway over the above described real estate, and desires the right of way over the same, to consist of a strip or belt of land ——— feet in width, through the centre of which the centre line of said railway will run, together with such other land as may be necessary for bermes, waste banks, and borrowing pits, and for wood and water stations (or desires the same for the purposes mentioned in sections twelve hundred and forty-two, and twelve hundred and forty-three of this chapter [§§ 1905, 1906], as the case may be), and unless you proceed to have the damages to the same appraised on or before ——— day of ———, A. D. 18— (which time must be at least four weeks after the first publication of the notice), said company will proceed to have the same appraised on the ——— day of ——— (which must be at least eight weeks after the first publication of the notice), at which time you can appear before the appraisers that may be selected.

——— Railroad Company.

By —— ——, attorney, or —— ——, agent.

[13 G. A., ch. 62, §§ 1, 2, 3.]

Where the proceedings were based upon the assumption that the owner was a non-resident and unknown, *held*, on *certiorari*, that the contrary not being made to appear, the proceedings were not irregular. *Everett v. Cedar Rapids & M. R. R. Co.*, 28–417.

The notice must name the person whose land has been taken or affected. It is not sufficient that it is directed to all other persons having an interest in the property described. *Birge v. Chicago, M. & St. P. R. Co.*, 65–440.

1912. Notice published. 1248. Said notice shall be published in some newspaper in the county, if there be one; if there is none, then in a newspaper published in the nearest county through which the proposed railway is to run, for at least eight successive weeks prior to the day fixed for the appraisement at the instance of the corporation. [Same, § 3.]

1913. Appraisement. 1249. At the time fixed in either aforesaid notices, the appraisement may be made and returned in tracts larger than forty acres, and all the lands appearing of record to belong to one person and lying in one tract may be included in one appraisement and return, unless the agent or attorney of the corporation, or the commissioners, has actual knowledge that the tract does not belong wholly to the person in whose name it appears of record; and in case of such knowledge, the appraisement shall be made of the different parcels, as they are known to be owned. [Same, § 4.]

That damages to the entire premises of a property owner, and not merely to the government subdivision through which the road passes, are to be assessed, see notes to § 1908.

1914. Dwelling-house, garden, or orchard. 1250. If it appears from the finding of the commissioners, that the dwelling-house, outhouse, orchard, or garden, of the owner of any land taken will be overflowed or otherwise injuriously affected by any dam or reservoir to be constructed under such section twelve hundred and forty-two of this chapter [§ 1905], such dam shall not be erected until the question of such overflowing or other injury has been determined upon appeal in favor of the corporation. [12 G. A., ch. 117, § 3.]

1915. Talesmen. 1251. In case of the death, absence, neglect, or refusal, of any of said freeholders to act as commissioners as aforesaid, the sheriff shall summon other freeholders to complete the panel. [R., § 1319.]

1916. Costs. 1252. The corporation shall pay all the costs of the assessment made by the commissioners, and those occasioned by the appeal, unless on the trial thereof a less amount of damages is awarded than was allowed by the commissioners. [R., § 1317; 14 G. A., ch. 119.]

Unless the court is asked to make an apportionment of costs complained of, error in not making such an apportionment cannot be made on appeal. *Cox v. Mason City & Ft. D. R. Co.*, 77–20.

Where the damages allowed on the appeal are less than those awarded in the assessment, in the absence of any showing that either party has made an offer, the costs should be apportioned. *Noble v. Des Moines & St. L. R. Co.*, 61–637.

If, on the trial of an appeal by the land owner, a less amount of damages is given than was awarded by the commissioners, the court is not bound to tax all the costs of appeal to him, but may distribute them according to the general rules of law without reference to this section. *Jones v. Mahaska County Coal Co.*, 47–354.

The purchaser of a railroad pending an appeal from allowance of damages for right of way becomes liable for the payment of costs incurred in such proceeding. *Frankel v. Chicago, B. & P. R. Co.*, 70–424.

1917. Report recorded. 1253. The report of the commissioners, where the same has not been appealed from, and the amount of damages assessed and costs have been deposited with the sheriff, or, if an appeal is taken and the amount of damages assessed on the trial thereof has been paid to the sheriff, may be recorded in the record of deeds in the county where the land is situate, and such record shall be presumptive evidence of title in the corporation to the property so taken, and shall constitute constructive notice of the rights of such corporation therein. [13 G. A., ch. 125, § 1.]

The company cannot be compelled to pay the damages assessed and take the right of way, but may waive the rights acquired by the proceedings, be-

ing liable, however, for costs, and any damages actually suffered by the land owner. *Gear v. Dubuque & S. C. R. Co.*, 20–523

The recording of the award, if done by mistake, does not pass any title to the company so as to raise an implied contract to pay the amount of the award; certainly not until the fact of the mistake has become known to the company and it has had a reasonable time to correct it. *Dimmick v. Council Bluffs & St. L. R. Co*, 58-637.

Where a portion of plaintiff's land was included in the right of way condemned, but the road was not actually constructed over any portion of his land, which remained fenced and was not entered upon, *held*, that an appropriation did not appear, and title to the right of way did not pass to the company until it had made payment. *Ibid.* And see *S. C.* 62–409.

APPEALS IN CONDEMNATION PROCEEDINGS.

1918. How taken. 1254. Either party may appeal from such assessment of damages to the circuit [district] court within thirty days after the assessment is made, by giving the adverse party, or, if such party is the corporation, its agent or attorney, and the sheriff, notice in writing that such appeal has been taken; the sheriff shall thereupon file a certified copy of so much of the appraisement as applies to the part appealed from, and said court shall thereupon take jurisdiction thereof and try and dispose of the same as in actions by ordinary proceedings. The land owner shall be plaintiff and the corporation defendant. [R., § 1317.]

Waiver. Objections to the jurisdiction of the sheriff's jury are not waived by appearance on appeal. *Stough v. Chicago & N. W. R. Co.*, 71–641.

Exclusive remedy. The remedy by appeal is conclusive of all other remedies as to the manner and method of taking advantage of irregularities in the proceeding. *Philips v. Watson*, 63–28.

An appeal is a plain, adequate and speedy remedy when the claim is that insufficient damages are given. Irregularities in the proceeding cannot be corrected by *certiorari*. *Cedar Rapids, I. F. & N. W. R. Co. v. Whelan*, 64–694.

Joint Assessment. Where the damages are assessed jointly in favor of two owners, one of them cannot properly prosecute an appeal without joining the other as appellant or making him a party to the proceedings by notice. Upon failure to do so the appeal should be dismissed on motion. *Chicago, R. I. & P. R. Co. v. Hurst*, 30–73.

A subsequent settlement with a part of the owners in common, where the assessment is not apportioned, will not defeat an appeal with those not settled with. *Ruppert v. Chicago, O. & St. J. R. Co.*, 43–490.

By mortgagee. The owner may take an appeal without joining a mortgagee therein, although an award has been made in favor of the owner and mortgagee jointly. *Lance v. Chicago, M. & St. P. R. Co.*, 57–636; *Dixon v. Rockwell, S. & D. R. Co.*, 75–367.

By person not party. A person not a party to the proceedings, although interested in the property, cannot appeal. Such person might, perhaps, make himself a party before the commissioners, but he cannot make himself a party merely by appealing. *Connable v. Chicago, M. & St. P. R. Co.*, 60–27; *Cedar Rapids, I. F. & N. W. R. Co. v. Chicago, M. & St. P. R. Co.*, 60–35.

Whether, where publication of notice is authorized to be made to parties interested, all persons interested are to such extent parties as that they may appeal, *quære*. *Ibid.*

As to part of damages. Where the assessment covers the entire damage to two contiguous tracts used together and owned by the same person, an appeal cannot be taken from an assessment as to one tract only. *Cedar Rapids, I. F. & N. W. R. Co. v. Chicago, M. & St. P. R. Co.*, 60–35.

The Sheriff is not a party to the condemnation proceedings, and is not disqualified from serving notice of appeal therein. *Ibid.*

Notice. Whether the giving of notice to the deputy sheriff would be sufficient, *quære*. *Waltmeyer v. Wisconsin, I. & N. R. Co.*, 64–688.

But where it appeared that notice was brought to the sheriff's attention and he directed the deputy to accept service, *held*, that the notice was sufficient. *Ibid.*

Notice of appeal may be properly served on the engineer in charge of the survey and location of the railroad, and transacting business connected with securing the right of way in the county where the appeal is taken. *Jamison v. Burlington & W. R. Co.*, 69–670.

Where the notice of appeal describes the premises in the same way as they are described in the application for condemnation, the land owner is not limited in his recovery of damages accruing to the portion of his premises described, but may show the damages to his entire farm. *Dudley v. Minnesota & N. W. R. Co.*, 77–408.

The time for taking the appeal begins to run from the time the assessment is in fact made, reduced to writing, and made public, or in some legitment manner comes to the knowledge of the parties interested. *Ibid.*

Upon motion being made to dismiss the appeal because not taken in time, affidavits of jurors for making the assessment are receivable to show when the assessment was actually made. *Ibid.*

Filing papers. Where the appeal has properly been taken by notice, the appellant should not be prejudiced by a failure of the officer to file the papers at the time required by statute. *Robertson v. Eldora R. etc., Co.*, 27–245.

Change of venue may be had on the appeal the same as in civil actions. *Whitney v. Atlantic Southern R. Co.*, 53–651.

Assessment of damages on appeal. On appeal the question of damages is to be determined upon its merits and the regularity of prior proceedings, such as the selection of commissioners, etc., is not to be called in question. That can only be done by *certiorari*. *Mississippi & M. R. Co. v. Rosseau*, 8–373. And see *Runner v. Keokuk*, 11–543.

The assessment of damages upon appeal is to be made without any reference to that appealed from. *Huhn v. Chicago, O. & St. J. R. Co.*, 43–333.

The notice of appeal is presumptive evidence of an assessment from which an appeal can be taken. *Ibid.*

An appeal by the land owner from the assessment of the commissioners cures any defect in regard to giving notice of the assessment to such owner. *Borland v. Mississippi & M. R. Co.*, 8–148.

In the proceedings on appeal an offer to confess judgment may be made with the consequences provided in § 4109, with reference to costs. *Harrison v. Iowa Midland R. Co.*, 36–323.

The company may dismiss the proceedings at any time before judgment upon payment of costs. *Burlington & M. R. v. Sater*, 1–421.

It would seem that a land owner appealing need not give bond; but even if that be necessary, the failure to give bond at the time the appeal is taken ought not to work the dismissal of the appeal. *Robertson v. Eldora R. etc., Co.*, 27–245.

Judgment. Where, under the provisions of a previous statute, general judgment was rendered against the company on the appeal, *held*; that it could have no greater effect than an assessment of damages. *Gear v. Dubuque & S. C. R. Co.*, 20–523.

Allowance of interest. In case of an appeal by the railway company, the proper measure of damages is the value of the land at the time of its appropriation, with interest thereon to the date of judgment. *Daniels v. Chicago I. & N. R. Co.*, 41–52.

Interest may be allowed on damages awarded from the time of condemnation, provided the damages are greater than those allowed by the sheriff's jury. *Hartshorn v. Burlington C. R. & N. R. Co.*, 52–613.

Interest on the assessment does not begin to run from the time of the assessment, but only from the time of taking possession. *Haye v. Chicago, M. & St. P. R. Co.*, 64–753.

In estimating the damages upon appeal the jury may consider the injury as originally sustained, and the interest which the original sum would have borne during the delay. *Noble v. Des Moines & St. L. R. Co.*, 61–637.

Where the court simply directed the jury to allow plaintiff the market value of the land taken at the time that it was taken, *held*, that such instruction was proper, and that interest should be allowed on the amount of the verdict from the time of the appropriation. *Hollingsworth v. Des Moines & St. L. R. Co.*, 63–443.

The damages are to be assessed as of the date of the assessment by the sheriff's jury, and then upon the rendition of the verdict the court should make the proper order touching the question of interest. Such order should fix the date when the interest begins to run, which should be when the company deprives the property owner of the use of his property. *Reed v. Chicago, M. & St. P. R. Co.*, 25 Fed. Rep., 886.

1919. Deposit. 1255. An appeal shall not delay the prosecution of the work upon said railway, if said corporation pays or deposits with the sheriff the amount assessed by the commissioners; said sheriff shall not pay such deposit over to the person entitled thereto after the service of notice of an appeal, but shall retain the same until the determination thereof. [R., § 1317.]

If an appeal is taken to the lower court and the damages awarded are greater than were allowed by the commissioners, the company desiring to appeal to the supreme court must deposit the additional amount with the sheriff, and is not relieved from the obligation to do so by giving a *supersedeas* bond. *Downing v. Des Moines N. W. R. Co.*, 63–177.

The right of the owner to receive the amount so deposited is suspended until the appeal is decided. The property is not taken, in an absolute sense, until the final assessment is paid, and the section is, therefore, not unconstitutional. *Peterson v. Ferreby*, 30–327.

The sheriff holds the deposit not as agent of the owner, but as agent of the company, and if it does not come into the hands of the owner, or is for any reason lost or misappropriated, such loss must be sustained by the company. *White v. Wabash, St. L. & P. R. Co.*, 64–281.

For moneys paid to a sheriff the land owner may maintain action against him at any time after the expiration of thirty days allowed for appeal. The statute of limitations, therefore, runs against such action from that time, and the fact that the land owner has refused the money and has attempted by injunction to restrain the taking of his land will not prevent the running of the statute. *Lower v. Miller*, 66–408.

1920. When barred. 1256. An acceptance by the land owner of the damages awarded by the commissioners shall bar his right to appeal.

So *held* before there was any such statutory provisions. *Mississippi & M. R. Co. v. Byington*, 14–572.

1921. Trial; judgment. 1257. On the trial of the appeal, no judgment shall be rendered except for costs; the amount of damages shall be ascertained and entered of record, and, if no money has been paid or deposited with the sheriff, the corporation shall pay the amount so ascertained, or deposit the same with the sheriff before entering upon the premises.

Under the Revision (which contained no similar provision), *held*, that where a general judgment was rendered against the company on appeal, it could have no greater effect than an assessment of damages as contemplated by the statute. *Gear v. Dubuque & S. C. R. Co.*, 20–523.

Interest may be allowed on the damages awaaded from the time of condemnation, provided such damages are greater than as found by the sheriff's jury. *Hartshorn v. Burlington, C. R. & N. R. Co.*, 52–613.

Further as to interest, see notes to § 1918.

1922. Additional deposit. 1258. If, on the trial of the appeal, the damages awarded by the commissioners are increased, the corporation shall pay or deposit with the sheriff the whole amount of damages awarded before

entering on, or, in any manner whatever, using or controlling the premises. And said sheriff, upon being furnished with a certified copy of such assessment, may remove said corporation, its agents, servants, or contractors, from said premises unless the amount of the assessment is forthwith paid or deposited with him.

Where the amount of damages awarded by the commissioners is paid to the sheriff and the company enters upon the land, if upon appeal by the land owner a larger sum is awarded, the company may be enjoined from further use of the property until it pays such further sum. *Richards v. Des Moines Valley R. Co.*, 18–259.

The federal court will not order its marshal to oust the railway company from the possession of the premises for non-payment of damages for the right of way fixed in that court on appeal, when the remedy of the statute, by application to the sheriff, is open to the property owner. *Reed v. Chicago, M. & St. P. R. Co.*, 25 Fed. Rep., 886.

If appeal is taken from the award and the damages awarded are greater than were allowed by the commissioners, the company desiring to appeal to the supreme court must deposit the amount with the sheriff, and is not relieved from the obligation by giving a *supersedeas* bond. *Downing v. Des Moines N. W. R. Co.*, 63–177.

1923. Damages reduced. 1259. If the amount of the damages awarded by the commissioners is decreased on the trial of the appeal, the amount assessed on the trial of such appeal only shall be paid the land owners.

CONDEMNING RIGHT OF WAY FOR CHANNELS AND DITCHES.

1924. In what cases. 18 G. A., ch. 191, § 1. In all cases where any railroad corporation, organized under the laws of this state or any other state, owning or operating a line of railroad within this state, would have the right at this time, by procuring the right of way from the land owner, to dig a channel or cut a ditch in such manner as to change and straighten the course of a stream too frequently crossed by its road, or to protect the right of way and road-bed, or promote the safety and convenience of the operation of the road, such railroad company may condemn the right of way as provided in the next section.

This statute, at least in so far as it applies to cases where the right of way is taken, as provided for the purpose of promoting the safety of the traveling public, is not unconstitutional as authorizing the taking of private property for other than a public purpose. *Reusch v. Chicago, B. & Q. R. Co.*, 57–687.

1925. Method of Procedure. 18 G. A., ch. 191 § 2. Any such railroad corporation desiring the right of way for any of the purposes contemplated in the preceding section, where its officers and the land owner cannot agree upon the compensation to be paid him, or when he refuses to grant the right of way, may cause to be condemned, of land belonging to such person a strip or belt of such reasonable width as may be necessary for the channel or ditch so desired, by pursuing in all respects, as near as may be, and so far as applicable, the provisions of law for the condemnation of real estate for right of way for said railroads, as provided in sections 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252 and 1253 of the code of 1873. [§§ 1904–1917].

1926. Appeal. 18 G. A., ch. 191, § 3. Either party may appeal from such assessment in the manner provided for appeals from the assessments of

the sheriff's jury in the condemnation of real estate for right of way for railroads, and sections 1254, 1255, 1256, 1257, 1258, and 1259 of the code [§§ 1918–1923] shall be applicable to such appeal.

1927. Intent of statute. 18 G. A., ch., 191, § 4. The true intent of this act is not to create in favor of a railroad corporation any additional right to divert a water-course from its natural channel, but simply to give the right to condemn the land necessary for the right of way in all cases where by conveyances to the railroad corporation it would have the right to dig such channels or ditches; *provided*, that nothing herein shall permit any railroad company to turn the channel of any stream off of any cultivated or pasture or meadow lands, when said stream only touches said lands at one point, unless it be by the consent of the owner of said land.

NON-USER OF RIGHT OF WAY; ABANDONMENT.

1928. Effect of. 1260; 15 G. A., ch. 65; 18 G. A., ch. 15. In any case where a railway constructed in whole or in part, has ceased to be operated or used for more than five years, or in any case where the construction of a railroad has been commenced by any corporation or person, and work on the same has ceased and has not been in good faith resumed for more than five years, and the same remains unfinished, or where any portion of such railway has not been operated for four years last past, and the rails and rolling stock have been wholly removed therefrom, it shall be deemed and taken that the corporation or person thus in default has abandoned all right and privilege over so much as remains unfinished, or from which the rails and rolling stock have been wholly removed, as aforesaid, in favor of any other corporation or person which may enter upon such abandoned work, as provided in section twelve hundred and sixty-one of the code [§ 1929]; *provided, however*, that if said road-bed or right of way, or any part thereof, shall not be used or operated for a period of eight years, or in any case where the construction of a railway has been commenced by any corporation or person, and work on the same has ceased and has not been in good faith resumed by any corporation or person for a period of eight years, the land and the title thereto shall revert to the owner of the section, sub-division, tract or lot from which it was taken; *and provided, further*, that the provisions of this act shall not apply to any railroad having a portion of its track laid with a wooden rail. [13 G. A., ch. 91, § 1.]

1929. Condemning abandoned way. 1261. In every such case of abandonment, any other corporation may enter upon such abandoned work, or any part thereof, and acquire the right of way over the same and the right to any unfinished work or grading found thereon and the title thereto, by proceeding in the manner provided, and conforming in all particulars as near as may be to the provisions of this chapter; but parties who have previously received compensation in any form for the right of way on such abandoned railway, which has not been refunded by them, shall not be permitted to recover the second time, but the value of such road-bed and right of way, excluding the work done thereon, when taken for a new company, shall be assessed to the former company or its legal representative. [Same, 2.]

Where, upon condemnation of a right of way over agricultural college land, the damages assessed were deposited with the sheriff, *held*, that with-

out return to the amount thus deposited the grantee of the agricultural college could not have another assessment of damages for the use of the premises by another railway company. *Chicago, M. & St. P. R. Co., v. Bean,* 69-257.

A land owner who has received compensation which has not been refunded by him cannot recover the second time. *Dubuque & D. R. Co. v. Diehl,* 64-635.

The easement being acquired by express grant is not aside from the statutory provision barred by a failure to use the same for ten years, and a possession of the property, during that time, by the original owner in the absence of any act of his preventing the use. *Barlow v. Chicago R. I. & P. R. Co.,* 29-276; *Noll v. Dubuque, B. & M. R. Co.,* 32-66.

A land owner who has received damages for a right of way and has entered into an agreement by which another company has taken and used such right of way is not in position to rely on an abandonment by the first company. *Marling v. Chicago, C. R. & N. R. Co.,* 67-331.

A portion of a line may become abandoned. Whether it is so or not is a question of fact. *Central Iowa R. Co, v. Moulton & A. R. Co.,* 57-249.

This statute defines what shall be regarded as an abandonment of a right of way, and nothing less than nonuser for eight years will authorize the owner of the land from whom the right of way was taken to retake possession. If he does so the company may at any time within eight years enter upon the land again and resume its use. *Fernow v. Chicago, M. & St. P. R. Co.,* 75-526.

The provisions of this section apply to the case of a railroad which has been commenced and abandoned before the enactment of the statute. The time which had expired before the enactment and after the abandonment of the work is to be taken into account in computing the eight years. A railroad company has no vested right by contract to hold a right of way which it has abandoned, and the section is not unconstitutional in that respect. *Skillman v. Chicago, M. & St. P. R. Co.,* 78-404.

1930. Crossings over highways. 1262. 15 G. A., ch. 47; 19 G. A., ch. 122. Any such corporation may raise or lower any turnpike, plank-road, or other highway, for the purpose of having its railway cross over or under the same; and in such cases said corporation shall put such highway, as soon as may be, in as good repair and condition as before such alteration. [R., § 1321.]

This section as it originally stood, authorizing a railway corporation to raise or lower a highway "for the purpose of having its railway pass over or under the same," was construed to confer upon railway companies the right to construct their tracks upon the public highways, including the streets of a city, without compensation to an abutting property owner, where he did not own the fee in the highway or street. *Milburn v. Cedar Rapids,* 12-246; *Gear v. Chicago, C. & D. R. Co.,* 39-23.

But as now amended, by substituting "cross" for "pass," it cannot be construed as authorizing such use of highways or streets without other express legislative authority. *Stanley v. Davenport,* 54-463.

A railway cannot be laid diagonally across the street in front of an abutting lot, except in accordance with the provision of § 623. *Enos v. Chicago, St. P. & K. C. R. Co.,* 78-28.

The objection imposed by the statute upon a railway company constructing and operating its railway, to construct at all points where the highway crosses it sufficient and safe crossings, is binding upon all corporations using railways in the state. *Farley v. Chicago, R. I. & P. R. Co.,* 42-234.

The embankment constructed as a necessary approach to the crossing is a part of the crossing and the company is required to keep it in repair. *Ibid.*

The company is bound to keep crossings in a safe condition, and this obligation extends to the approaches to a bridge. *Newton v. Chicago, R. I. & P. R. Co.,* 66-422.

The company is under obligation to build and keep in repair an overhead crossing and the approaches thereto, provided the grade crossing is unsuitable and the overhead crossing is necessary to put the street in proximately as good repair and condition as before the railroad was built. *Ibid.*

As the railway has the right to raise or lower highways at crossings, an indictment charging the company with digging, plowing and scraping such highway, throwing up embankments and making excavations, etc., at points where the railway crosses such highway, does not state facts sufficient to constitute the crime of obstructing the highway. *State v. Chicago, R. I. & P. R. Co.*, 63–508.

In an action for personal injuries received at a public crossing, the fact that the crossing is not as good as the highway was before the construction of the railway is admissible for the purpose of showing what vigilance was required of the railway as to the use of signals and the operation of trains in approaching such crossing. *Funston v. Chicago, R. I. & P. R. Co.*, 61–452.

The railway has no right to fence its track where it crosses streets or alleys properly laid out, whether they have been improved and used by the public or not. *Lathrop v. Central Iowa R. Co.*, 69–105.

And see notes to § 1972.

1931. Further repairs. 1263. If the supervisor, trustees, city council, or other person having jurisdiction over such highway require further or different repairs or alterations made thereon, or, if the same, in their opinion, is unsafe, they shall give notice thereof in writing to any agent or officer of the corporation, and if the parties are unable to agree respecting the same, either may apply by petition, setting out the facts, to the circuit [district] court, or judge thereof, and such court or judge shall cause reasonable notice to be given the adverse party of the application; the petition shall be filed in the clerk's office, and may be answered as in other cases. The court shall determine the matter in a summary way and make the necessary orders in relation thereto, giving such corporation a reasonable time to comply therewith, and upon failure to do so, said court may enjoin the corporation from using so much of its road as interferes with any such highways, and the court may award costs in favor of the prevailing party, [R., §§ 1322–3.]

1932. Temporary ways. 1264. Every such corporation when employed in raising or lowering any highway, or in making any other alteration by means of which the same may be obstructed, shall provide and keep in good order suitable temporary ways to enable travelers to avoid or pass such obstructions. [R., § 1324.]

1933. Over railways, canals, etc. 1265. Any such corporation may construct and carry its railway across, over or under any railway, canal, or water-course, when it may be necessary in the construction of the same; and in such cases said corporation shall so construct its crossings as not unnecessarily impede travel, transportation, or navigation upon the railway, canal, or stream so crossed; said corporation shall be liable for the damage occasioned by any corporation or party injured by reason of said crossing. [R., § 1325.]

The requirement of § 2005, that trains shall come to a full stop at crossings of other railroads, necessarily renders crossings on grade an impediment, to some extent, to travel and transportation, but the inconvenience and delay arising from their use must be borne by the company. The company constructing an intersecting line is required to so construct the crossing as not to unnecessarily interfere with the crossing of the other road. Whether

such crossing shall be made at grade, or over or under the other, must depend upon circumstances; and under particular facts, *held*, that a requirement that an under-crossing be constructed was not unreasonable. *Humestone & S. R. Co. v. Chicago, St. P. & K. C. R. Co.*, 74–554.

1934. Bridges. 1266. Every such corporation shall maintain and keep in good repair all bridges with their abutments, which it may construct for the purpose of enabling its railway to pass over or under any turnpike, highway, canal, water-course, or other way. [R., § 1326.]

1935. Damages. 1267. Every such corporation shall be liable for all damages sustained by any person in consequence of any neglect of the provisions of this chapter. [R., § 1327.]

The provisions of this section do not extend the liability of the corporation to the acts of those not its agents or servants. *Callahan v. Burlington & M. R. Co.*, 28–562.

1936. Private crossings. 1268. When any person owns land on both sides of any railway, the corporation owning the same, shall, when requested so to do, make and keep in good repair one cattle-guard and one causeway or other adequate means of crossing the same, at such reasonable place as may be designated by the owner. [R., § 1329.]

When required. The company need not provide a crossing unless the land owner requires it. *Henderson v. Chicago, R. I. & P. R. Co.*, 48–216.

The duty of the company to construct a private crossing may be enforced by *mandamus*. *Boggs v. Chicago, B. & Q. R. Co.*, 54–435.

And in the particular case, *held*, that a request of the person owning land on both sides of the railway track, for an open crossing at a particular point, was not unreasonable, and compliance therewith might be enforced. *Ibid.*

The owner of land is authorized to designate the place where the crossing for his benefit shall be made, and the limitation put upon his choice of location is that the place designated shall be a reasonable one. *Van Vrankin v. Wisconsin, I. & N. R. Co.*, 68–576.

Where the only means a citizen has of reaching a highway is across the railway, he may insist that an open crossing be provided for him by means of which he may reach the highway without stopping to open the gates or remove bars. *Gray v. Burlington & M. R. R. Co.*, 37–119.

Where a party owning land on opposite sides of a highway maintains a lane and fences in such manner as to indicate that he prefers an open crossing instead of one closed by gates, the company will not be liable to him for failure to maintain such gates. *Tyson v. Keokuk D. M. R. Co.*, 43–207.

Where a railroad passes through a pasture the owner is not, as a matter of course, entitled to an open crossing for his stock, regardless of any other means of crossing. To entitle him to such a crossing it must appear that there is no provision for passing from one part of the field to the other, which is adequate under the circumstances. *Curtiss v. Chicago, M. & St. P. R. Co.*, 62–418.

A company required to maintain and construct proper cattle-guards cannot by contract with another company, whose road it purchases, relieve itself from the right or obligation to do so. *Downing v. Chicago, R. I. & P. R. Co.*, 43–96.

Gates and bars at private crossings. If the company undertakes to and does construct fences, gates, crossings and cattle-guards, etc., for a private owner, a request for their construction may be presumed, and the company will be required to keep them in repair. *Miller v. Chicago, R. I. & P. R. Co.*, 66–546.

Under the provisions of a previous statute, differing from the present one as to private crossings, *held*, that a company had a right to construct fences at such crossings, but must provide the same with gates. *McKinley v. Chicago, R. I. & P. R. Co.*, 47–76, 78.

The duty to maintain gates at private crossings is a part of the duty to fence, and the company will be liable for damages to stock injured by reason of failure to construct such gates or keep them in repair. *Ibid; Mackie v. Central R. of Iowa*, 54-540.

As to the liability for failure to fence in general, see § 1972.

The obligations imposed upon the company to fence and to provide private crossings are correlative, and if it does each as well as it can consistently with the other it is not liable. *Henderson v. Chicago, R. I. & P. R. Co.*, 39-220.

Where the company is required to put in a private crossing and erect proper gates and bars, it will not be liable for negligence of a person for whom the crossing is constructed in habitually leaving such gates or bars open, further than that it must use reasonable diligence and care in keeping them closed. *Ibid.*

But the company is not responsible in the absence of negligence, although it knows that the land owner or other persons are in the constant or usual habit of leaving the gates open. *Henderson v. Chicago, R. I. & P. R. Co.*, 43-620.

Where the company nailed up the gates at a private crossing for the reason that they had been habitually left open, and the land owner tore down the fence so that the gates should be open, *held*, that it was error to instruct the jury as to the effect of the abandonment by the land owner of his crossing. *Ibid.*

The sufficiency of the gates provided at a private crossing is a question of fact for the jury; and *held*, that it was error to instruct the jury that such gates were sufficient in view of the fact that the land owner gave no notice to the company of objection thereto, and himself believed them sufficient. *McKenly v. Chicago, R. I. & P. R. Co.*, 43-641.

Under particular facts, *held*, that it was not sufficiently shown that injury to stock resulted from defect in the gate through which they escaped upon the track. *Bothwell v. Chicago, M. & St. P. R. Co.*, 59-192.

In an action for injuries to stock from failure to maintain a gate at a private crossing in good condition, evidence of the condition of the gate two or three days after the accident, is not being shown that its condition as to security was different from what it was at the time of the accident, was held proper. *Mackie v. Central R. of Iowa*, 54-540.

Where the company constructs a gate at a private crossing without fastenings, and in such manner that it may be blown open by the wind, it is not proper to charge the jury that the responsibility for keeping the gate closed is upon the person for whose convenience it is constructed, and that he cannot recover for injuries to his stock coming upon the track through such gate. *Hammond v. Chicago & N. W. R. Co.*, 43-168.

Where it appeared that a gate at a private crossing had been constructed without fastenings and the wind had sometimes blown it open, *held*, that it was improper to exclude from the jury the question as to whether the company was guilty of negligence in thus constructing it, and that the proof of the habit of an adjoining owner to leave the gate open would not preclude recovery on the account of such negligence in the original construction, it not appearing that it had been left open by such owner in the particular instance when the damage occurred. *Ibid.*

A company may be liable without knowledge of the defect in the fence, if in the exercise of reasonable care, such knowledge would have been acquired. If the fence was originally defective the company is chargeable with knowledge thereof without express notice. *Ibid.*

The company is only liable for negligence in failing to put up the bars at a private crossing, which have been left down, after acquiring knowledge of their condition, or in not ascertaining their condition, and the burden of proving such negligence is upon the plaintiff. *Perry v. Dubuque Southern R. Co.*, 36-102.

Proof of the mere fact that bars have been left down by some person, and that through them cattle have strayed upon the track and been injured, does not make a *prima facie* case of liability on the part of the company. Such liability, if it exists at all, arises from the conduct of the company after the

bars have been left down, either in failing to put them up after acquiring knowledge that they were down, or in neglecting to use reasonable diligence to ascertain such condition. *Ibid.*

And as to a like rule in regard to failure to repair fences, see notes to § 1972.

It is erroneous to instruct the jury that a person whose stock has been injured upon the track makes a *prima facie* case against the company by showing that the gate through which stock came upon the track was out of repair previous to the accident. Proof of such fact does not cast upon defendant the burden of showing that the accident did not result by reason of the gate being open. Such fact would be a circumstance tending to show that it was open through defendant's fault, which might have much or little weight according to circumstances; but the burden of proof would remain upon plaintiff to show negligence of defendant causing the injury. *Johnson v. Chicago, R. I. & P. R. Co.*, 55–707.

The fact that the bars are left down by the land owner will not as to third persons discharge the company from its obligation to keep them closed. *Bartlett v. Dubuque & S. C. R. Co.*, 20–188.

But the land owner could not recover for injuries resulting therefrom, and might be liable to a third person injured by such bars being open. *Russell v. Hanley*, 20–219.

If, by reason of the act of the land owner in wrongfully removing a gate at a private crossing on his land, stock of a third person gets upon the track and is injured, and the company is held liable therefor, it may recover from such land owner the amount which it has been compelled to pay. *Chicago & N. W. R. Co. v. Dunn*, 59–619.

A land owner driving cattle in through the gate at one crossing and along the right of way, for the purpose of turning them out at the gate at another crossing is guilty of negligence; and in a particular case, *held* that there was not such negligence on the part of the employes of the company after they were aware of the cattle being on the track as to render them liable for damages in killing some of the cattle. *Davidson v. Central Iowa R. Co.*, 75–22.

VIADUCTS IN CITIES.

1937. When required. 22 G. A., ch. 32, § 1. The council of any city of the first class and cities organized under special charter or cities of the second class having a population of seven thousand or over, shall have power to require any railroad company or companies, owning or operating any railroad track or tracks upon or across any public street or streets of such city to erect, construct, reconstruct, complete and keep in repair to the extent hereinafter provided any viaduct or viaducts upon or along such street or streets and over or under such track or tracks including the approaches thereto as may be deemed and declared by ordinances of such city necessary for the safety and protection of the public; *provided,* that the approaches to any such viaduct which any railroad company or companies may be required to construct, or reconstruct and keep in repair shall not exceed for each viaduct a total distance of eight hundred feet, and *provided* further that no such viaduct shall be required on more than every fourth street running in the same direction and that no railroad company shall be required to build or contribute to the building more than one such viaduct with its approaches in any one year. Nor shall any viaduct be required until the board of railroad commissioners shall, after due examination, determined said viaduct to be necessary in order to promote the public safety and convenience, and the plans of said viaduct prepared as provided in section three hereof [§ 1939], shall have been approved by said board.

1938. Assessment of damages. 22 G. A., ch. 32, § 2. Whenever any such viaduct shall be deemed and declared by ordinances necessary for the safety and protection of the public, the council shall provide for appraising, assessing and determining the damages, if any, which may be caused to any property, by reason of the construction of such viaduct and its approaches. The proceedings for such purpose shall be the same as provided by law for taking possession of streets by railroad companies, except that the damages assessed shall be paid by the city.

1939. Specifications. 22 G. A., ch. 32, § 3. The width, heighth and strength of any such viaduct, and the approaches thereto, the material therefor, and the manner of construction thereof shall be such as may be required by the board of public works and approved by the mayor and council, but if there be no board of public works, then they shall be such as may be required by the council.

1940. Apportionment of cost; repairs. 22 G. A., ch. 32, § 4. When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and of the approaches thereto, to be constructed by each, or of the cost to be borne by each shall be determined by the council. After the completion of any such viaduct, any revenue derived therefrom by the crossing thereon of street railway lines, or otherwise, shall constitute a special fund, and shall be applied in making repairs to such viaduct. One-half of all ordinary repairs to such viaduct, or to the approaches thereto, shall be paid out of such fund, or shall be borne by the city, and the remaining half shall be borne by the railroad company or companies and if the track of more than one company is so crossed the said one-half of such repairs shall be borne by such companies in the same proportion as the original construction of such viaduct.

1941. Indemnity bond. 22 G. A., ch. 32, § 5. Every city to which this act applies is authorized and empowered to receive a bond of indemnity from persons interested in the construction of any such viaduct conditioned for the payment of all the damages which may be assessed in favor of abutting property owners together with costs.

1942. Refusal to comply. 22 G. A., ch. 32, § 6. If any railroad company neglects or refuses for more than thirty days after such notice as may be prescribed by ordinance, to comply with the requirements of any ordinance passed under the provisions hereof, the city may construct or repair the viaduct or approach which such ordinance may require such railroad company to construct or maintain, and recover the cost of such construction or maintenance from such railroad company in any court of competent jurisdiction.

PUBLIC WAYS TO MINES AND QUARRIES.

1949. By quarry or mine owners. 15 G. A., ch. 34, § 1. Any person, copartnership, joint-stock association, or corporation, owning, leasing, or possessing any lands having thereon or thereunder any coal, stone, lead, or other mineral, may have established over the land of another a public way from any stone-quarry, coal, lead or other mine, to any railway or highway, not exceeding (except by the consent of the owner of the land to be taken) fifty feet in width. When said road shall be constructed, it shall, when

passing through inclosed lands, be fenced on both sides by the person or corporations causing said road to be established.

No authority is given by this act to construct a private way. The way when condemned, is to be a public one, and the act is therefore not invalid. *Jones v. Mahaska, etc., Coal Co.*, 47-35.

A road or way established under the provisions of this statute is a public way, in the sense that the public may use and enjoy it in the manner in which roads and highways are ordinarily used by it, and the mine owner who procured it to be established must use the special privilege which the act confers on him in such a way as not to destroy this right of the public or prevent its enjoyment, and the statute is therefore constitutional. Nor can the construction of the railway in accordance with these provisions be enjoined on the ground that it prevents the owner of the land from constructing a railway thereon for his own use. *Phillips v. Watson*, 63-28.

11 G. A., ch. 127, which provided for the establishment of private ways was held unconstitutional; but *held, arguendo*, that to afford an outlet to a citizen or access to mineral wealth, a public way might properly be established. *Bankhead v. Brown*, 25-540.

1950. Proceedings. 15 G. A., ch. 34, § 2. If the owner of any real estate, necessary to be taken for the purposes mentioned in this act, refuse to grant the right of way, or if such owner and the person, partnership, joint-stock association, or corporation seeking to have such way established, cannot agree upon the compensation to be paid for the same, the sheriff of the county in which said real estate may be situated shall, upon the application of either party, appoint six disinterested freeholders of the county, not interested in a like question, who shall inspect said real estate, and assess the damage which said owner will sustain by the appropriation of said land for such public way, and make *and* report in writing to the sheriff of said county, and if the applicant for such public way shall at any time before entering upon said real estate, for the purpose of constructing such way, pay to said sheriff, for the use of said owner, the sum so assessed and returned to him as aforesaid, said highway may be at once constru[ct]ed and maintained over and across said premises.

1951. Provisions applicable. 15 G. A., ch. 34, § 3. In proceeding under this act, the application to the sheriff, the duty of commissioners, the time and manner of assessing the damages, the giving of notice thereof to residents and non-residents, the power of guardians to settle and convey, the making and returning of appraisement, the selection of talesmen, the payment of the costs of assessment, the report of the commissioners, the recording thereof, the right of appeal, the proceedings relating thereto, the result of non-user, the rights and duties as to other highways, are and shall be the same as provided in the sections of the code numbered twelve hundred and forty-five to and including twelve hundred and sixty-eight [§§ 1909, 1936], and the provisions of all of said sections, so far as applicable, are declared to be a part of this act, except that the report of the commissioners, and record thereof, shall confer no title to the applicant for the land taken for the highway, but shall be presumptive evidence of the establishment of such way.

1952. Railway established. 15 G. A., ch. 34, § 4. Any owner, lessee, or possessor of lands having coal, stone, lead, or other mineral thereon, who has paid the damages assessed for highways established under this act, may construct, use, and maintain a railway on such way, for the purpose of

reaching and operating any quarry or mine on such land and of transporting the products thereof to market. In the giving of the notices required by this act, the applicant shall state whether a railway is to be constructed and maintained on the way sought to be established; and if it be so stated the jury shall consider that fact in the assessment of damages.

CONDEMNATION OF RIPARIAN RIGHTS.

1953. Erection of piers, cribs, etc. 15 G, A., ch. 35, §1. All owners and lessees of lands, or lots, situate upon the Iowa banks of the Mississippi and Missouri rivers, upon which property there is now, or may hereafter be, carried on any business which is in any way connected with the navigation of said rivers, or to which the said navigation is a proper or convenient adjunct, are hereby authorized to construct and maintain, in front of their said property, piers, cribs, booms, and other property and convenient erections and devices for the use of their respective pursuits and the protection and harbor of rafts, logs, floats and other water-crafts; *provided*, that the same present no material or unreasonable obstruction to the navigation of the stream, or to a similar use of adjoining property.

1954. Construction of railroad. 15 G. A., ch. 35, § 2. It shall not be lawful for any person or corporation to construct or operate any railroad or other obstruction between such lots or lands and either of said rivers, or upon the shore or margin thereof, unless the injury and damage to such owners occasioned thereby shall be first ascertained and compensated in the manner provided by chapter four, title ten of the code. [§ § 1904–1923.]

Whether § 1953 is in conflict with this act of congress (U. S. Rev. Stat., § 5254), relating to the construction of cribs, piers, etc., on the Mississippi river, *quære*. But even if it is, this section is not thereby rendered void. If a riparian owner is engaged in business connected with the navigation of the river it is not essential to his right to recover under this section that he should have erected a crib or pier in front of his property. The rule recognized in *Tomlin v. Dubuque, B. & M. R. Co.*, 32–106, is no longer applicable, Revision, § 1328, being now repealed. *Redwick v. Davenport & N. W. R. Co.*, 49–664; *S. C.*, 102 U. S., 108.

ORGANIZATION AND GENERAL PROVISIONS.

1955. Change of name. 1273. Any corporation organized under the laws of this state for the purpose of constructing and operating a railway, may, with the assent of two-thirds of all the stock-holders in interest, change the corporate name thereof. But no change in the name of any such corporation shall be deemed complete until the president and secretary thereof shall file in the office of the secretary of state, a statement, under oath, showing the assent of stockholders to such change, and the new name adopted, and a certified copy of the proceeding had by the corporation and stockholders in relation thereto as the same appears in the records thereof; from the time of such filing, the corporation by its new name shall be entitled to all the rights, powers and franchises that it possessed under the old name, and by the new name shall be liable upon all contracts and obligations of every kind and description entered into by or binding upon such corporation by or under its old name to the same extent and manner as if no change in the name of that corporation had been made. [10 G. A., ch. 44, § 3, 4.]

1956. Record. 1274. The secretary of state shall immediately record in the proper book in his office the matters filed under the preceding section and make intelligible references to the record of the articles of incorporation as originally recorded.

1957. May join or consolidate. 1275. Any such corporation may join, intersect, and unite its railway with the railway of any other corporation at such point on the boundary line of this state as may be agreed upon by such corporations. And with the assent of three-fourths in interest of all the stockholders, may, by purchase or sale, or otherwise, merge and consolidate the stock, property, franchises, and liabilities of such corporations, making the same one joint-stock corporation upon such terms as may be agreed upon not in conflict with the laws of this state. [R., § 1332.]

A railroad corporation organized under the general law may, after constructing a line, sell the property and continue the object of its incorporation by the construction of a new line. *Mahaska County R. Co. v. Des Moines Valley R. Co.*, 28–437.

Where the articles of incorporation of the company provided for the sale of the property with the limitation that "no sale shall be valid until all debts of the company shall be paid or arranged for," *held*, that the indebtedness being a very inconsiderable sum, if anything, and the purchaser having inquired if there were any debts, and being always ready to pay any that might be established, a sale under such circumstances was valid. *Ibid.*

Where a railway company through its directors sold its property to another company, and the directors and stockholders of the former stood by with knowledge of all the facts and saw the latter company make large expenditures on the property, *held*, that they were estopped from seeking a recovery of the property because of an irregularity in the sale. *Ibid.*

A company buying in the franchise of property of a railroad at a foreclosure sale does not become privy to any agreement on the part of the original company, except so far as it may be incorporated into the deeds of conveyance under which the title is held. *Close v. C. R. & N. R. Co.*, 64–149.

Where two railroad companies were consolidated under the arrangement that stock in the new company should be issued to stockholders in the old companies, and the new company should acquire the property of the old, *held* that a stockholder in one of the old companies did not, by such transfer of property, acquire a vendor's lien thereon *Cross v. Burlington S. & W. R. o.*, 58–62.

1958. Connections. 1276. Any such corporation which has or may construct its railway so as to meet or connect with any other railway in an adjoining state at the boundary line of this state, shall have power to make such contracts and agreements with the corporations controlling such railways in an adjoining state, for the transportation of freight and passengers, or for the use of its railway by such foreign corporation, as the board of directors may see proper. [R., § 1334.]

1959. Extension. 1277. Any such corporation organized for the purpose of constructing a railway from a point within the state may construct or extend the same into or through any other state under such regulations as may be prescribed by the laws of such state; and the rights and privileges of such corporation over said extension in the construction and use thereof, and in controlling and applying the assets, shall be the same as if the railway was constructed wholly within this state. [R., § 1333.]

1960. Duties and liabilities of lessees. 1278. All the duties and liabilities imposed upon corporations owning or operating railways by this chapter, shall apply to all lessees or other persons owning or operating

such railways as fully as if they were expressly named herein, and any action which might be brought, or penalty enforced, against any such corporation by virtue of any provision of this chapter, may be brought or enforced against such lessees or other persons. [12 G. A., ch. 79; ch. 172, § 1.]

The obligation to fence (under § 1972) rests upon the lessee as much as upon the lessor, and the lessee is liable to damages done by its train, although as between it and the lessor the duty of fencing rests upon the latter. *Clary v. Iowa Midland R. Co.*, 37–344.

Where the owner and a lessee each runs trains over the road, each is liable only for stock injured by its own trains by reason of the failure to fence. *Stephens v. Davenport & St. P. R. Co.*, 36–327.

The remedy given against the lessees by statute is merely cumulative, and the right of action for negligence causing the injury of a passenger exists as against the company in whose name the road is being operated, although it may, in fact, have been leased to and be under the control of a lessee. *Bower v. Burlington & S. W. R. Co.*, 42–546.

Prior to express statutory provision, *held*, that the statute imposing a liability for injuries to stock where the right of way is not fenced was applicable to a lessee. *Liddle v. Keokuk, Mt. P. & M. R. Co.*, 23–378.

But further, *held*, under the same statutory provision, that where the lessee had the exclusive right to run, operate and control the road, and had built and maintained fences along the road and had the same power to protect itself that the lessor would have, it was liable for injury to stock to the same extent as though it were owner of the road. *Stewart v. Chicago & N. W. R. Co.*, 27–282.

The company whose engines set out fire are liable for damages from the fire thus set out, although the road is owned and operated by another company and fire starts on the right of way by reason of combustible material allowed to accumulate thereon by such other company. *Slossen v. Burlington, C. R. & N. R. Co.*, 60–215.

Where a railway company incorporated under the laws of Iowa, leases its road to a foreign corporation, the lessor is a necessary party to an action for breach by the lessee of a contract entered originally with the lessor. The statutory provision as to the liability of a lessee does not discharge lessor from liability, but in effect makes both the lessor and lessee jointly liable. *Chicago & N. W. R. Co. v. Crane*, 113 U. S., 424.

A lessee of a railroad can exercise no right that its lessor could not, and if the lessor was subject to injunction against operating its road at the suit of the land owner whose property had been taken without compensation, the lessee is subject to the same restriction. *Hibbs v. Chicago & N. W. R. Co.*, 39–340.

The company owning a railroad, and in whose name it is being operated, is liable in an action for personal injuries received thereon, although the road is leased and operated by a lessee. *Bower v. Burlington & S. W. R. Co.*, 42–546.

Where a railroad was leased to defendant under a contract by which he was to manage the same and apply the profits, after paying operating expenses, to the payment of certain advances made by him, etc., *held*, that he was a trustee and was not individually liable as lessee for operating expenses. *United States Rolling Stock Co. v. Potter*, 48–56.

A receiver operating a railway under direction of the court is liable to judgment for personal injuries received by an employee from the negligence of other employes engaged in the operation of the road, under the statutory provision on such subject. *Sloan v. Central Iowa R. Co.*, 62–728.

For similar provisions, see § 1995.

1961. Offices. 1279. The offices of secretary and treasurer, or assistant treasurer or general superintendent of every railway corporation organized under the laws of this state, shall be kept where the principal place of business of such corporation is to be, in which offices the original record, stock and transfer books, and all the original papers and vouchers of such

corporation shall be kept; and such treasurer or assistant treasurer shall keep a record of the financial condition of the corporation, which may be inspected at all reasonable hours by any stockholder, or any committee appointed by the general assembly. Such corporation may keep in any other state a transfer office, in which may be kept a duplicate transfer book, but no transfer of shares of stock shall be legal or binding until the same is entered in the transfer book kept in this state. The secretary and treasurer, or assistant treasurer and general superintendent aforesaid shall reside in this state. [9 G. A., ch 159, §§ 2, 6.]

1962. Report. 1280. Every such corporation shall, annually, under the oath of the president, in the month of January, make a full report of the condition of its affairs to the secretary of state, and shall have the same published in some newspaper printed in the place of its general business office, showing the amount of the capital stock of such corporation, and the amount paid thereon, the amount of bonds issued, and how secured, and all other indebtedness; the length of such railway when completed, and how much is built and in use; the number of acres of land donated or granted to them, by whom and what disposition has been made of said grants or donations, the gross amount of receipts and how disbursed, the net amount of profit and the dividends made, with such other facts as may be necessary to a full statement of the affairs and condition of such corporation, and the secretary of state shall present the said report to the general assembly. [Same, § 3.]

1963. Proceedings to compel. 1281. In case any such corporation shall neglect to make such report as required in the preceding section; any stockholder may file his petition in the district [or circuit] court in the county where the principal business office is kept, stating that said report has not been made, and praying that an order may issue against the corporation commanding it to make said report; said petition, shall be under oath and filed at least ten days before the next term of the district [or circuit] court in said county, and notice thereof shall be given such corporation for the same length of time, and in the same manner as is now required to be given in other suits in the district [or circuit] court, and upon the filing of such petition, the clerk shall issue such order and make the same returnable at the next term of the district [or circuit] court in said county, and costs shall be recoverable by either party as in ordinary actions. [Same, § 4.]

1964. Examination. 1282. If it appears such report has not been filed, the court shall, during the term, appoint three disinterested and competent persons near the place of the general business office of the corporation as an investigating committee, who shall examine into its affairs and report at as early a day as practicable its condition, in manner and form as prescribed in section twelve hundred and eighty of this chapter [§ 1962]; one copy of said report to be filed in the office of the clerk of the district court of the county where the proceedings are had, and one copy to be filed in the office of the secretary of state. The compensation for the services of such committee shall be paid by the corporation thus investigated, but it shall not exceed three dollars per day and mileage at the rate of ten cents per mile, counting one way. [Same, § 5.]

STOCK AND DEBTS.

1965. Bonds; mortgages. 1283. Any such corporation shall have power to issue its bonds for the construction and equipment of its railway, in sums not less than fifty dollars, payable to bearer or otherwise, and bearing interest at a rate not exceeding ten per cent per annum, and make the same convertible into stock, and may sell the same at such rates or prices as is deemed proper; if such bonds are sold below the par value thereof, they shall, nevertheless, be valid and binding, and no plea of usury shall be allowed such corporation in any action or proceeding brought to enforce the collection of said bonds; such corporation may also secure the payment of said bonds by executing mortgages or deeds of trust of the whole or any part of its property and franchises. [R., § 1339; 10 G. A., ch. 20.]

1966. After-acquired property. 1284. Said mortgages or deeds of trust, may, by their terms, include and cover, not only the property of the corporation making them at the time of their date, but property both real and personal which may thereafter be acquired, and shall be as valid and effectual for that purpose, as if the property were in possession at the time of the execution thereof. [R., § 1340.]

1967. Execution of mortgages. 1285. Said mortgages or deeds of trust shall be executed in such manner as the articles of incorporation or by-laws of the corporation may provide, and shall be recorded in the office of the recorder of each county through which the railway of the corporation may run, or in which any property mortgaged or conveyed by such deeds of trust may be situated, and shall be notice to all the world of the rights of all parties under the same, and for this purpose, and to secure the rights of mortgagees or parties interested under deeds of trust so executed and recorded, the rolling stock and personal property of the company properly belonging to the road and appertaining thereto, shall be deemed a part of the road, and said mortgages and deeds so recorded, shall have the same effect both as to notice and otherwise, as to the personal, as to the real estate covered by them. [R., § 1341.]

The question of priority as between a general mortgage and a mortgage upon the rolling stock of a particular division, discussed. *United States Trust Co. v. Wabash, W. R. Co.*, 38 Fed. Rep., 891.

In a particular case the validity of bonds secured by the income and equipments of a railroad, was considered. *Simmons v. Taylor*, 38 Fed. Rep., 682.

1968. Preferred stock. 1286. Any such corporation, with the assent of two-thirds of all the stockholders in interest, may issue in payment of debts, preferred stock, not exceeding ten thousand dollars for each mile of railway constructed, which stock shall be entitled to such dividends as the directors of the corporation may determine, not exceeding eight per cent per annum, if the same is earned in any one year after payment of all interest on the bonds of the corporation before any dividend is made to the common stock. [10 G. A., ch. 44, § 1; 11 G. A., ch. 102.]

1969. Exchange for bonds. 15 G. A., ch. 20. Any railway corporation which has no surplus, after paying its running expenses, with which to pay the interest on its bonded indebtedness, with the assent of its bondholders, in addition to the right conferred by section one thousand two hundred and eighty-six of the code [§ 1968], may, with the assent of two-thirds of its

stockholders, issue its preferred stock, at par, to an amount equal to and not exceeding its bonded indebtedness, in exchange for its said bonded indebtedness. The said stock shall be entitled to such dividends from its net profits as the directors of the corporation may determine, not exceeding eight per cent per annum, if the same is earned in any one year, after payment of all interest on the indebtedness of the corporation, before any dividend is made to the common stock.

1970. Conversion into common stock. 1287. Such preferred stock, and any income or mortgage bond of the corporation, shall, at the option of the holder, be convertible into common stock in such manner and on such terms as the board of directors thereof may prescribe; but the aggregate amount of the common and preferred stock shall not exceed the total amount of stock which the corporation may be by law, or the articles of incorporation thereof, authorized to issue. [10 G. A., ch. 44, § 2.]

THE TRACK.

71. Cattle-guards; crossings; signs. 1288. Every corporation constructing or operating a railway, shall make proper cattle-guards where the same enters or leaves any improved or fenced land, and construct at all points where such railway crosses any public highway, good, sufficient, and safe crossings and cattle-guards, and erect at such points at a sufficient elevation from such highway to admit of free passage of vehicles of every kind, a sign, with large and distinct letters placed thereon, to give notice of the proximity of the railway and warn persons of the necessity of looking out for the cars; and any railway neglecting or refusing to comply with the provisions of this section, shall be liable for all damages sustained by reason of such neglect and refusal, and in order for the injured party to recover, it shall only be necessary for him to prove such neglect or refusal. [R., § 1331; 9 G. A., ch. 169, §§ 3, 4, 5.]

Cattle-guards. This section makes it necesssary that cattle-guards be constructed, not only where the track goes through outside fences, but also at division fences. *Smith v. Chicago, C. & D. R. Co.*, 38–518.

Where the track passes through the lands of two owners fenced in common, and subsequently a division fence is constructed, it is the duty of the company upon notice to put in a cattle-guard, and it will be liable for the value of crops destroyed by reason of the failure to do so. *Donald v. St. Louis, K. C. & N. R. Co.*, 44–157.

Where a railroad is constructed across unimproved or uninclosed land, and the land is afterwards improved or inclosed, the railway company is under obligation to construct cattle-guards just as it would have been under obligation to do if the land had been inclosed at the time the road was constructed. *Heskett v. Wabash, St. L. & P. R. Co.*, 61–367.

Whether notice to the company to construct cattle-guards is necessary after the land has been thus inclosed *quære*; but if necessary, the service of notice upon the station agent is sufficient. *Ibid.*

This provision as to cattle-guards applies to cases where the corporation fences its right of way. When it does so there is fenced land, and, upon entering or leaving, the law requires a cattle-guard. *Robinson v. Chicago, R. I. & P. R. Co.*, 67–292.

The statute is imperative, and the court will not engraft an exception upon it relieving a company from obligation to put in a cattle-guard on the ground that it is not fit, proper and suitable to do so in a particular case. *Mundhenk v. Central Iowa R. Co*, 57–718.

Where it appeared that plaintiff's horses were put temporarily in a field, from which they escaped through a defective fence, and were injured by reason, as alleged, of an insufficient cattle-guard, in a county where cattle were not allowed to run at large, *held*, that the facts did not necessarily show contributory negligence defeating plaintiff's right to recover. *Timins v. Chicago, R. I. & P. R. Co.*, 72-94.

The company is required to use ordinary care and diligence to keep the cattle-guards on its track free from snow and ice after it has notice or could have acquired notice, in the exercise of ordinary care, that they are obstructed thereby. The company after such notice has a reasonable time and opportunity to remove the snow and ice. *Graham v. Chicago, St. P. & K. C. R. Co.*, 78-564; *Robinson v. Chicago, R. I. & P. R. Co.*, 76-495; *Giger v. Chicago & N. W. R. Co.*, 80--492.

There is nothing in this section requiring a company to make cattle-guards at a private crossing. *Bartlett v. Dubuque & S. C. R. Co.*, 20-188. (But see § 1936.)

Method of construction. The term cattle-guard as used in the statute imports a guard or protection extending the whole width of the right of way. The owner is under no obligation to construct a fence up to the track upon the right of way. *Mundhenk v. Central Iowa R. Co.*, 57-718; *Heskett v. Wabash, St. L. & P. R. Co.*, 61-467.

The duty of connecting a cattle-guard with the right of way fence devolves upon the company, and is implied in the duty to construct the guard itself. *Miller v. C., R. I. & P. R. Co.*, 66-546.

Where the right of way and public highway intersects obliquely, the company should fence to the point where the highway crosses the track, and construct the cattle-guard there, and not at the point where the highway intersects the right of way. *Andre v. Chicago & N. W. R. Co.*, 30-107.

Crossings. Where a railway impinged upon a highway some twenty rods from the place where it finally crossed it, *held*, that all the intervening highway was not to be deemed a part of the crossing, within the meaning of this section. *Beatty v. Central Iowa R. Co.*, 58-242.

It is the duty of the company to repair the crossings and keep them in a safe condition. *Farley v. Chicago, R. I. & P. R. Co.*, 42-234.

The embankment constructed as a necessary approach to the crossing is a part of the crossing, and the company is required to keep it in repair. *Ibid.*

Purchasers of a road at judicial sale take subject to any oral obligations to maintain crossings, etc., made by the former company in connection with the acquisition of the right of way. *Swan v. Burlington, C. R. & N. R. Co.*, 72-650.

Negligence. Where plaintiff's cow was injured by a wild-train at a highway crossing, *held*, that it was a question for the jury whether it was negligence in the plaintiff to allow his cow to be at such crossing at the time when no regular train was due. *Courson v. Chicago, M. & St. P. R. Co.*, 71-28.

Further as to stock killed at crossings, see notes to next section.

Evidence in a particular case *held* sufficient to sustain a verdict against a railroad company for injury to a horse at a cattle guard. *Meade v. Kansas City, St. J. & C. B. R. Co.*, 45-699.

Where the sufficiency of a cattle-guard was in question, *held*, that the fact that a similar guard situated on other premises was sufficient to, and did, keep out stock, was not material or relevant. *Downing v. Chicago, R. I. & P. R. Co.*, 43-96.

Under the evidence in a particular case, *held*, that it was for the jury to say whether or not the cattle-guard was sufficient for the purpose for which it was constructed. *Timins v. Chicago, R. I. & P. R. Co.*, 72-94.

Measure of damages. As the owner of the land has no legal right to construct cattle-guards across the track, he is not bound to do so in order to protect himself from damages for want thereof, but may recover whatever damages he may sustain by reason of his land being unfenced. *Raridon Central Iowa R. Co.*, 65-640; *Downing v. Chicago, R. I. & P. R. Co.*, 43-9

Measure of damages for failure to erect a cattle-guard at a partition fence between two fields, one of which might have been used for pasture, *held* to be the difference between the value of the pasture in the condition in which

the inclosure was left by the company and what the value would have been if the cattle guards had been maintained. *Raridan v. Central Iowa R. Co.*, 69–527.

Where the land owner seeks to recover the entire value of a crop which he alleges to have been totally lost by reason of the failure of the company to construct cattle-guards, the question of how much less value the crop is by reason of such failure, is a question of proof. The fact that a claim is made for the entire loss will not prevent the owner from recovering whatever loss is suffered. *Raridon v. Central Iowa R. Co.*, 65–640.

The measure of damage for crops destroyed by reason of failure to put in a cattle-guard where a partition fence is erected subsequently to the completion of the road is the value of the crop destroyed by reason of such failure. *Donald v. St. Louis, K. C. & N. R. Co.*, 44–157.

Double damages. A cattle-guard is not to be deemed a part of the fence required by other statutory provisions, and the company is not liable in double damages for failure to construct a fence. *Moriarity v. Central Iowa R. Co.*, 64–696. *Rhines v. Chicago & N. W. R. Co.*, 75–597.

Contract. A company required to maintain and construct proper cattle-guards cannot, by contract with another company whose road it purchases, relieve itself from the right or obligation to do so. *Downing v. Chicago, R. I. & P. R. Co.*, 43–96.

Signs. This section only renders the company liable for damages sustained by reason of the failure to erect such signs. *Lany v. Holiday Creek R., etc., Co.*, 49–469.

The failure to erect a sign renders the company absolutely liable in a case wherein it is shown that a person was injured at a crossing. Evidence of the injury and of the company's neglect to erect the sign establishes its liability, and it is not necessary for plaintiff to show his own care. (As the case arose, however, under a previous statute, this point was not involved). *Payne v. Chicago, R. I. & P. R. Co.*, 44–236.

Under a previous statute which did not contain the provision that proof of the neglect to erect a sign should be sufficient to entitle the injured party to recover for injuries received at such crossing, *held*, that proof of failure to erect a sign established negligence on the part of the company, but did not relieve plaintiff of the necessity of showing that his own negligence did not contribute to the injury. *Dodge v. Burlington, C. R. & M. R. Co.*, 33–276; *Correll v. Burlington, C. R. & M. R. Co.*, 38–120; *Payne v. Chicago, R. I. & P. R. Co.*, 39–523; *S. C.*, 44–236.

1972. Fencing; liability for stock killed; speed at depots; damages by fire. Any corporation operating a railway, that fails to fence the same against live-stock running at large at all points where such right to fence exists, shall be liable to the owner of any such stock injured or killed by reason of the want of such fence for the value of the property or damage caused, unless the same was occasioned by the wilful act of the owner or his agent. And, in order to recover, it shall only be necessary for the owner to prove the injury or destruction of his property; and if such corporation neglects to pay the value of or damage done to any such stock within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, has been served on any officer, station or ticket agent employed in the management of the business of the corporation in the county where the injury complained of was committed, such owner shall be entitled to recover double the value of stock killed or damages caused thereto; *provided*, that no law of the state, nor any local or police regulations of any county, township, city or town, regulating the restraint of domestic animals, or, in relation to the fences of farmers or land owners, shall be applicable to railway tracks, unless so specifically stated in the law or regulation. The operating of trains upon depot grounds necessarily used by the company and public,

where no such fence is built, at a greater rate of speed than eight miles per hour, shall be deemed negligence and render the company liable under this section. *And provided, further* that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, and such damages may be recovered by the party damaged in the same manner as set forth in this section in regard to stock, except to double damages. [Same, § 6; 14 G. A., ch. 128.]

Failure to fence. This section makes the fact of the injury or destruction of stock on the railway track *prima facie* evidence of negligence on the part of the corporation, and the burden of proof is upon the defendant to establish the building of a good and sufficient fence. *Brentner v. Chicago, M. & St. P. R. Co.*, 68–530.

In order to render the company liable for injury to stock, negligence must be shown, but it is sufficient to make out a *prima facie* case to show the injury and that it occurred by reason of the omission to fence. Thereupon the burden is upon the company to show freedom from negligence in the matter of a fence. *Small v. Chicago, R. I. & P. R. Co.*, 50–338.

If a railroad company fails to fence its road it is absolutely liable for stock injured, in the absence of the wilful act of the owner. *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30–459.

Liability for injury under this section attaches where the want of a fence in connection with some act of the company is the proximate cause of the injury. If it is claimed that defendant is liable for negligence in so constructing a bridge as to render it dangerous for stock running at large, such negligence must be directly alleged. *Asbach v. Chicago, B. & Q. R. Co.*, 74–248.

Before the enactment of this statute it was held that to permit cattle to run at large did not impute negligence on the part of the owner, and that cattle would not be trespassers if found upon the unfenced track of a railway; that if the track was unfenced the company would be held to the use of ordinary care and diligence in running its trains to avoid injuring such stock, but if its track was fenced it would only be liable for injury resulting from gross or wilful negligence. *Russell v. Hanley*, 20–219; *Alger v. Mississippi M. R. Co.* 10–268.

The railroad company is required to fence its track for the protection of "crazy" horses as well as for the protection of animals posessing good "horse sense." The fact that the animal is injured by reason of failure to leave the track through want of natural intelligence will not show that the injury did not result from want of a fence. *Liston v. Central Iowa R. Co.*, 70–714.

This statutory provision does not require railway companies to fence their roads, but subjects them to certain liabilities if they fail to do so. Failure to fence cannot, therefore, be imputed to the company as negligence in a case where a child, playing on an unfenced track of a road, is run over by one of the company's trains. *Walkenhauer v. Chicago, B. & Q. R. Co.*, 3 McCrary, 553.

A railway company does not owe to its employees the duty to fence its right of way, and employees are supposed to contract to operate the road in its unfenced condition so far as it is unfenced. Any additional exposure on that account must be presumed to have been taken into consideration upon entering into the employment. *Patton v. Central Iowa R. Co.*, 73-306. (By § 1973–1975; fencing is now obligatory.)

The railway company is liable for stock killed by a construction train by reason of the failure to fence, although the road is not completed. *Glandon v. Chicago, M. & St. P. R. Co.*, 68–457.

The land owner may by his conduct release the railway company from liability for its failure to build and maintain a fence. The tenant who acquires the right to occupy and use the land jointly with the owner, with knowledge of such release from liability, would acquire no greater right than that of his lessor. *Manwell v. Burlington, C. R. & N. R. Co.*, 80–662.

Animals not struck by train. It may be said that an animal is injured by reason of the failure of the company to fence when the want of a fence

in connection with the acts of the defendant is the proximate cause of the injury. Therefore, where a horse going upon a track where there was a failure of the company to fenee, being frightened by a coming train, ran upon a bridge and was injured, there being no other practicable means of escape for the animal, *held*, that the company was liable. *Young v. St. Louis, K. C. & N. R. Co.*, 44–172.

It is therefore for the jury to say whether or not in a particular case an animal injured upon the track without being struck by the train was injured by defendant's negligence. *Kraus v. Burlington, C. R. & N. R. Co.*, 55–338.

The fact that the train does not strike the animal does not relieve the company of liability for the injury. *Liston v. Central Iowa R. Co.*, 70–714.

Evidence in a particular case held sufficient to show that injury to an animal was due to its being frightened or struck by defendant's train. *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80–620.

Negligence. Plaintiff may ask recovery for stock killed, on the ground that the road was not fenced, pleading the facts entitling him to such recovery, and also on the ground of the negligent manner in which the train was operated, and he may then introduce evidence to sustain both or either of these causes of action. *Scott v. Chicago, M. & St. P. R. Co.*, 68–360.

Where it is claimed that stock was injured by reason of defective fence plaintiff may without proof of that fact recover the value of the stock killed if it is shown that the injury of the stock was due to negligence of the employes of the company operating the train. *Baker v. Chicago, B. & Q. R. Co.*, 73–389.

The burden of proof is upon plaintiff to show that the injury occurred at a place where defendant had a right to fence and did not, and that it was caused by defendant 's negligence. *Comstock v. Des Moines Valley R. Co.*, 32–376.

An agreement with the land owner by which he undertakes to erect and maintain a fence will not prevent liability on the part of the company to other persons for double damages for stock injured where such land owner has failed to fence or repair, even though the owner of the stock has placed them for pasture upon the land of the person agreeing to maintain the fence. *Warren v. Keokuk & D. M. R. Co.*, 41–484.

Negligence of land owner. Where a company is compelled to pay for injuries to animals of a third person which have got upon the track through a gate at a private crossing, wrongfully removed by the land owner for whom the gate was constructed, it may recover from such land owner the amount so paid. *Chicago & N. W. R. Co. v. Dunn*, 59–619.

The fact that there were two gaps in a railroad fence within four hundred feet of each other, made by the plaintiff in the prosecution of work connected with such railroad, *held* not to preclude the owner from recovering damages for injuries to his stock by their escape upon the railroad track through a gap in the fence intermediate the two made by him and for which he was not responsible. *Accola v. Chicago, B. & Q. R. Co.*, 70–185.

Sufficiency of fence. The fence contemplated is such as is reasonably sufficient to prevent live stock from going on the railroad track. It is error to charge the jury that when fences are constructed along the right of way by the company they must, in order to relieve it from liability for injuries to stock, be such as to absolutely prevent stock from getting under, through or over the same. *Shellabarger v Chicago, R. I. & P. R. Co.*, 66–18.

The fence must not only be sufficient to turn horses and cattle, but must be sufficient to turn swine, or the company will be liable for swine killed. *Fritz v. Milwaukee & St. P. R. Co.*, 34–337.

The fence must be sufficient to turn like stock of any kind in order to exonerate the company from liability for injuries to such live stock. It is not sufficient that the fence be such as is described by statute as a lawful fence. *Lee v. Minneapolis & St. L. R. Co.*, 63–131.

A bluff, a hedge, a trench, a wall, a trestle, or the like, may constitute a sufficient fence. The question whether the fence is sufficient is for the jury. *Hilliard v. Chicago & N. W. R. Co.*, 37–442.

The fact that the fences and track are so constructed that stock having once entered upon the right of way cannot, when frightened and driven be-

fore the engine, find a safe place to leave the track will not render the company liable. *Gilman v. Sioux City & P. R. Co.*, 62-299.

The fact that the fastening of a gate in the fence is placed on the inside may be a proper matter to be considered by the jury in determining whether the fence is sufficient. *Butler v. Chicago & N. W. R. Co.*, 71-206.

The company is required to do no more than erect such fence as under ordinary circumstances will keep live stock from its track, and it is not rendered liable by the fact that snowdrifts cover the fence so that it no longer restrains stock from passing over. It is not required to remove such drifts. *Patten v. Chicago, M. & St. P. R. Co.*, 75-459.

Replacing fences destroyed. The allegation that the road is unfenced at the time of the action is supported by proof of the removal or destruction of the fence before the accident. *Fritz v. Kansas City, C. B. & St. J. R. Co.*, 61-323.

Where the fences were swept away by a flood, failure to rebuild them within two months after the road was repaired and operated, *held* sufficient to render the company liable. *Ibid.*

If a fence constructed by the company falls by reason of its insufficiency, it is immaterial that it was not down such length of time before the animal passed through that the company might, in the exercise of due diligence, have had knowledge thereof. *Libby v. Chicago, M. & St P. R. Co.*, 60-323.

Where the track has been properly fenced and the fence has been destroyed, the company is liable, in case of a failure to use reasonable and ordinary diligence and care in rebuilding it. Reasonable time must be allowed. *McCormick v. Chicago, R. I. & P. R. Co.*, 41-193.

Failure to repair fences. While the company is liable for stock injured or killed on its track by reason of its failure to keep in repair the fences which it has erected on the line of its road, yet before such liability will attach the company must have a knowledge, either express or implied, that the fence is out of repair, and a reasonable time after such notice to put it in repair. *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30-459; *Hilliard v. Chicago & N. W. R. Co.*, 37-442.

Knowledge that the fence is out of repair may be shown by the lapse of such time as to afford reasonable presumption thereof. *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30-459; *Davis v. Chicago, R. I. & P. R. Co.*, 40-292.

The company having constructed a sufficient fence is only liable for failure to exercise reasonable care and diligence in maintaining it. *Lemmon v. Chicago, & N. W. R. Co.*, 32-151.

It is error to instruct the jury that the company would be liable if it failed to erect and maintain a fence sufficient to keep cattle from its right of way, and the cattle were injured by reason of such failure. The jury must be allowed to consider whether the defect in the fence was occasioned by want of repair, and if so, whether the company had discovered that it was out of repair, or should have discovered it in the exercise of reasonable care, and had had a reasonable time afterward to make the repair. *Brentner v. Chicago, M. & St. P. R. Co.*, 58-625.

Where a railway was fenced only upon one side, and the animal injured was confined in a field inclosed in part by such fence, and escaped therefrom by reason of the fence being blown down by a storm, *held*, that the railroad not being fenced as required, the company was liable without regard to whether it was negligent in repairing the fence which was blown down, for the reason that the road was not properly fenced, and the animal after escaping from the inclosure was running at large. *Tredway v. Sioux City & St. P. R. Co.*, 43-527.

When it appears that the fence was in good condition in the evening and stock escaped through it during the night, *held* there was not negligence in failing to repair. *Davidson v. Central Iowa R. Co.*, 75-22.

Burden of proof. Liability of the company for injuries caused by bars being left down at private crossings exists, if at all, either in failing to put them up after acquiring knowledge that they are down, or neglect to use reasonable diligence in ascertaining such condition, and the burden of proving these facts is upon the plaintiff seeking to recover damages for such negligence. *Perry v. Dubuque Southwestern R. Co.*, 36-102.

In case of an injury to stock by reason of a gate being open the burden is on the plaintiff to show that the gate became open by defendant's fault. The fact that the gate was defectively constructed, unless it became open by reason of such construction, is not sufficient to entitle plaintiff to recover. *Butler v. Chicago & N. W. R. Co.*, 71--206.

A railway is required to exercise due care to keep gates closed and obtain knowledge of their condition. If it fails to exercise such care and through its negligence remains ignorant of the fact that a gate is open, it will be chargeable with having knowledge of that fact which due care would have given it. It is the duty of the company in such cases to close a gate after gaining knowledge that it is open, whether left open by its own employees or others. The question whether it should have had knowledge is for the determination of the jury. *Wait v. Burlington, C. R. & N. R. Co.*, 74--207.

Further as to gates and bars at private crossings, see § 1936 and notes.

An instruction to the effect that defendant was not liable unless there was neglect in failing to repair the fence within a reasonable time after notice of the defective condition, *held* proper, as the jury must have understood therefrom that the burden of showing neglect rested upon the party seeking to recover. *Dunn v. Chicago & N. W. R. Co.*, 58-674.

Evidence of the condition of the fence subsequent to the time of the injury is admissible only where it is shown that there had been no change in the condition. *Brentner v. Chicago, M. & St. P. R. Co.*, 58-625.

Evidence of the condition of the fence at the time of the accident is admissible for the purpose of showing that the company was negligent in allowing it to get out of repair, and such evidence need not be confined to the particular portion of the fence through which the stock escaped. *Lemmon v. Chicago & N. W. R. Co.*, 32-151.

Where damages are claimed by reason of the injured stock having escaped upon the right of way by reason of the fastening of a gate in the fence of the company being defective, evidence is admissible to show that other like fastenings have proved insufficient, and it is not competent for defendant to show that the fastening used was of the kind generally in use. *Payne v. Kansas City, St. J. & C. B. R. Co.*, 72-214.

Ownership of stock. In an action against a railway company for damages for stock killed by its train, the ownership of the stock is an issuable fact, and while possession might make out a *prima facie* case of ownership, yet there must be such proof of possession or other proof of ownership to entitle plaintiff to recover. *Welsh v. Chicago, B. & Q. R. Co.*, 53-632.

Stock running at large. The company is only liable for injuries to stock "running at large," and not when it is in charge of the owner and being driven by him at the time of the injury. *Smith v. Chicago, R. I. & P. R. Co.*, 34-96.

Stock which escapes from the inclosure of the owner upon the track of the company is "running at large." *Hinman v. Chicago, R. I. & P. R. Co.*, 28-491.

And so, too, is stock which is in a field through which the railway passes and where the company has failed to fence. *Swift v. North Missouri R. Co.*, 29-243.

The words "running at large" mean "not under control of the owner." A mule which had escaped from its owner, and which he was unable to catch, *held* to be running at large. *Hammond v. Chicago & N. W. R. Co.*, 43-168.

Allegations in a petition that the animal injured escaped upon the railroad track, *held* to be in effect an allegation that he was running at large. *Liston v. Central Iowa R. Co.*, 70-714.

A horse may be regarded as running at large where he has escaped from the control of his owner and cannot be caught by him. So *held* where the horse injured had on a bridle and an untied halter rope. *Welsh v. Chicago, B. & Q. R. Co.*, 53-632.

Where a person in charge of a herd of cattle left them temporarily, and before the person who was to succeed him in their care took possession of them one of them escaped from the herd and was very soon afterward killed on defendant's railway track, not having been missed from the herd,

held, that such animal was running at large within the meaning of this section. *Valleau v. Chicago, M. & St. P. R. Co.*, 73–723.

A suckling colt may be considered as running at large within the provision of the statute, although its mother is under the control of the owner. *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58–622.

A team of horses hitched to a wagon and which have escaped from the control of their owner are, within the terms of this statute, "live-stock running at large." *Inman v. Chicago, M. & St. P. R. Co.*, 60–459.

Plaintiff while driving his team across defendant's track within the limit of the depot grounds, was run into by defendant's train which was being run at a higher speed than eight miles an hour. In an action for double damages for the killing of plaintiff's horse from such accident, *held* that the horse killed was not running at large in such sense that the plaintiff could recover double damages under this section. *Johnson v. Chicago & N. W R. Co.*, 75–157.

Where the driver of a team became so intoxicated that he had no control over the animals, and they wandered out of the road and upon a railway track where it was not fenced as it should have been, *held* that the animals were not running at large in such sense that the owner could recover double damages. *Grove v. Burlington, C. R. & N. R. Co.*, 75–163.

Where herd law is in force. The fact that the herd law forbidding stock to run at large is in force in the county, does not preclude recovery for injuring animals which have escaped from the premises of the owner through a reasonably sufficient fence. *Story v. Chicago, M. & St. P. R. Co.*, 79–402.

It is error to instruct the jury that it is the duty of the company to build and maintain fences sufficient to keep cattle off the track under all ordinary circumstances, and that it is liable for all injury to cattle occasioned by its failure to perform that duty. The instructions should be qualified by limiting the liabilities to injuries caused to animals running at large. *Brentner v. Chicago, M. & St. P. R. Co.*, 68–530.

Proof of injury. When stock is killed at a place where the company has failed to fence, it will be presumed, *prima facie*, that the injury occurred "by reason of the want of such fence." *Spence v. Chicago & N. W. R. Co.*, 25–139.

The evidence in a particular case as to stock killed by a train, having been struck by the train going in a particular direction and carried upon a bridge, *held* sufficient to support a verdict for damages. *Martin v. Central Iowa R. Co.*, 59–411.

In an action against the company for injury to stock, there being no direct evidence as to whether the injury was caused by defendant's train, the jury may consider the character of the injury for that purpose, but evidence that when animals are struck by moving trains there is always some indication left along the track of the collision is not proper. *Clark v. Kansas City, St. L. & N. R. Co.*, 55–455.

Double damages; constitutionality. The provision as to double damages is constitutional. It is uniform in its operation as to all persons or companies pursuing a particular business. *Jones v. Galena & C. U. R. Co.*, 16–6; *Welsh v. Chicago, B. & Q. R. Co.*, 53–632.

Nor does such provision deny to railway companies, or persons operating railways, equal protection of the laws. *Tredway v. Sioux City & St. P. R. Co.*, 43–527.

This provision does not conflict with the constitutional guarantees for the protection of property. *Mackie v. Central Railroad of Iowa*, 54–540. And see *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S., 26.

Not a penalty. The statute giving the owner double damages is not unconstitutional, as in conflict with the provision that all fines and penalties shall be paid into the school fund. Such damages are not a fine or penalty, and the legislature may determine the measure of damages to be recovered as in other particular cases. *Ibid.*

No part of the double damages is a statute penalty in such sense as to bring the action therefor within the provisions of the statute of limitations as to actions to recover such penalties. The period of limitation for such action is five years. *Koons v. Chicago & N. W. R. Co.*, 23–493.

Not applicable in other cases. The provision for double damages being penal in its character will not be considered as applicable to any case not coming clearly within its provisions. Therefore, *held*, that double damages could not be recovered for injuries resulting from failure to construct and keep in repair a proper cattle-guard as required by the section with reference to cattle-guards. *Moriarity v. Central Iowa R. Co.*, 64-696. *Rhines v. Chicago & N. W. R. Co.*, 75-597.

Neither can the provision be construed so as to authorize the recovery of double damages for injuries to stock on depot grounds where the company has no right to fence, caused by negligence in operating trains thereon. *Miller v. Chicago & N. W. R. Co.*, 59-707.

Double damages can be recovered only when stock has been injured or killed by reason of the want of a fence, and not when the injury results by reason of the company having fenced where it should not. *Davis v. Chicago R. I. & P. R. Co.*, 40-292.

For failure to repair. A railway company is liable in double damages for injuries caused by negligence in failing to keep a fence in repair as well as by reason of failure to fence. *Bennet v. Wabash, St. L. & P. R. Co.*, 61-355; *Payne v. Kansas City, St. J. & C. B. R. Co.*, 72-214.

Interest. As this statutory provision establishes the measure of recovery in the cases contemplated, the court or jury cannot, in addition to the damages authorized, allow interest on the amount of recovery from the time of the accident, or from the time of the expiration of the thirty days allowed after notice in which to pay the damages. *Brentuer v. Chicago, M. & St. P. R. Co.*, 68-530.

Assignment The right of the owner to recover double damages may be assigned, and the assignee may serve the notice and affidavit required to authorize such recovery. *Everett v. Central Iowa R. Co.*, 73-442.

Laws of another state. An action for double damages may be maintained in the courts of this state for injury occuring in another state which has a statute authorizing the recovery of such double damages. *Boyce v. Wabash R. Co.*, 63-70.

Tender. Where stock was killed and before suit tender was made and kept good of a sum less than the value of the stock as found by the jury on the trial, such tender being made as in full payment, *held*, that plaintiff was entitled to double damages in the full amount found by the jury, and that a tender to be sufficient must be of an amount large enough to discharge defendant's full liability. *Brandt v. Chicago, R. I. & P. R. Co.*, 26-114.

Where a gross sum is tendered by the railway company in payment of damages caused by injuries to two different animals of the same owner, but does not make a seperate tender as to each, and the jury find the aggregate damage to be greater than the amount tendered, such tender cannot be considered as sufficient for either. *Shuck v. Chicago, R. I. & P. R. Co.*, 73-333.

Instructions in a particular case as to plaintiff's right to recover double damages, *held*, sufficient to present the issue. *Scott v. Chicago, M. & St. P. R. Co.*, 78-199.

Notice and affidavit. The written notice required by statute to entitle the owner to recover double damages is only necessary when double damages are sought. *Rodemacher v. Milwaukee & St. P. R. Co.*, 41-297.

The affidavit required to entitle a party to double damages may be made by any one acquainted with the facts. *Henderson v. St. Louis, K. C. & N. R. Co.*, 36-387.

It is not necessary that the affidavit designate the place of the injury. *Mundhenk v. Central Iowa R. Co.*, 57-718.

The notice and affidavit need not be separate. If the notice contains the statements necessary in the affidavit, and is sworn to, that is sufficient. *Mendell v. Chicago & N. W. R. Co.*, 20-9.

It is only necessary that the notice be such as to inform the company of the injury. It need not be stated therein that the animals were running at large or were destroyed without the wilful act of the owner. *Mackie v. Central R. of Iowa*, 54-540.

The purpose of the notice and affidavit is to advise the corporation for how

much and for what the injured party claims. They should together so far as practicable inform the company of such material facts as will enable it to investigate the claim and decide whether it will pay the amount demanded. It was not designed by this section to dispense with all proof on the part of the owner, except as to the injury or destruction of his property, but it is manifest that he must prove other facts, among which are that the property was of the kind contemplated by the statute, that the corporation was engaged in operating a railroad, and that the stock was injured or killed by reason of its failure to fence at a point where the right to fence existed. The recovery of double damages should be limited to twice the amount stated in the notice and affidavit. *Manwell v. Burlington, C. R. & N. R. Co.*, 80-662.

The owner is entitled to recover double the damages resulting from physical injury to stock, and in this may be included expense of time and money incurred in efforts to heal the injured animals. The same rule would apply to all damages which result directly from the injuries. *Ibid.*

The fact that the amount claimed in the notice is greater than the value of the animal as stated in the petition is not sufficient in itself to show bad faith. If defendant claims that plaintiff's demand was made in bad faith such fact should be pleaded and issue joined thereon, and the same submitted to the jury. *Valleau v. Chicago, M. & St. P. R. Co.*, 73-723.

A return stating service of the notice upon a person named, "being the station agent of said road," etc., sufficiently shows service upon the station agent "employed in the management of the business of the corporation," as provided for by statute. *Welsh v. Chicago, B. & Q. R. Co.*, 53-632; *Schlengener v. Chicago, M. & St. P. R. Co.*, 61-235.

An amendment to an affidavit for the purpose of perfecting the jurat may be allowed, but the company will not become entitled to the thirty days after the amendment in which to pay the claim and escape double damages, where it is clear that there was a *bona fide* attempt on the part of the owner to bring himself within the provisions of the statute, and it was so understood by defendant. *Mundhenk v. Central Iowa R. Co.*, 57-718.

The original of the affidavit and notice of loss should be delivered to the agent upon whom service is made. The delivery of a copy is not sufficient. *McNaught v. Chicago & N. W. R. Co.*, 30-336; *Campbell v. Chicago, R. I. & P. R. Co.*, 35-334.

Service of notice may be made by leaving the original and reading a copy. *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80-620.

Tne original of the affidavit must be served upon the company or its agent, and a copy thereof introduced in evidence. The introduction in evidence of a paper similar to that served upon the company is not sufficient. *Kyser v. Kansas City, St. J. & C. B. R. Co.*, 56-207.

The officer making service may, by oral testimony, show that he served the original, although his return states the service of a copy. *Liston v. Central Iowa R. Co.*, 70-714.

Service of the affidavit and notice should be made by delivering them to the agent of the company. It is not necessary to read them and deliver a copy. *Mendell v. Chicago & N. W. R., Co.*, 20-9.

As the statute does not prescribe the manner of service, a service by simply delivering the notice and affidavit to the person upon whom service is to be made is sufficient. *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

Service of the affidavit may be made by the claimant or any other person. *Mundhenk v. Central Iowa R. Co.*, 57-718.

Whether proof of service of notice and affidavit upon the company can be made by an *ex parte* affidavit, *quære*. *Brentner v. Chicago, M. & St. P. R. Co.*, 58-625.

The notice and affidavit will be admissible as proof of service if the return of the officer serving the same be regularly endorsed thereon. *Brandt v. Chicago. R. I. & P. R. Co.*, 26-114.

Evidence that a paper was read and given to the agent similar to that introduced in evidence is a sufficient proof of service of the notice of which the paper introduced is a copy. *Keyser v. Kansas City, St. J. & C. B. R. Co.*, 56-440.

The original of notice and affidavit of loss which have been served upon

defendant's agent are not evidence of such service in such sense that notice upon the defendant to produce them must be shown before other evidence thereof can be introduced to show double liability to the company. *Bretner v. Chicago, M. & St. P. R. Co.*, 58-625; *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58-622; *McLenon v. Kansas City, St. J. & C. B. R. Co.*, 69-320.

Pleading. In an action before a justice of the peace for killing stock for which the company is liable in double damages, the notice and affidavit may be introduced in evidence though not mentioned in the pleadings, as no petition need be filed. *Brandt v. Chicago, R. I. & P. R. Co.*, 26-114.

On the trial of an action against the company to recover double damages, the fact that the notice required by statute was not attached to the petition must be raised by demurrer, if at all, and cannot be raised as an objection when the notice is offered in evidence. *McKinley v. Chicago, R. I. & P. R. Co.* 47-76.

Question for jury. Although the sufficiency of the service of the notice is a question of law for the court, yet where the fact of service is in issue its determination may properly be left to the jury. *Cole v. Chicago & N. W. R. Co.*, 38-311.

Fencing at depot grounds. The company is not required to fence where it would not, in view of public convenience, be fit, proper or suitable for it to do so. Depot and station grounds may be left uninclosed when the business of the road and the interests of the public so require. *Latty v. Burlington, C. R. & M. R. Co.*, 38-250; *Smith v. Chicago, R. I. & P. R. Co.*, 34-506; *Davis v. Burlington & M. R. R. Co.*, 26-549; *Rogers v. Chicago & N. W. R. Co.*, 26-558; *Durand v. Chicago & N. W. R. Co.*, 26-559.

In the absence of proof of want of ordinary care, a company is not liable for stock killed on depot grounds. *Packard v. Illinois Central R. Co.*, 30-474.

Where it appeared that stock was killed one and one-fourth miles from a station, *held*, that it might be presumed that the place at which it was killed was not within depot grounds in the absence of any evidence upon the question. *Smith v. Chicago, M. & St. P. R. Co.*, 60-512.

The burden is upon the company to show that the place where stock is injured and where there is no fence is a portion of the station grounds. The fact that a switch is there maintained will not necessarily give it that character. *Comstock v. Des Moines Valley R. Co.*, 32-376.

Whether the public convenience and interest of the road require that grounds used in connection with the depot, but not the ordinary place for receiving and delivering freight, shall be left uninclosed, is a question of fact properly submitted to the jury. *Rhines v. Chicago & N. W. R. Co.*, 75-597.

Where the company has its depot grounds surveyed and definitely allotted, the survey or allottment and use constitute a very strong presumptive proof of their necessary boundaries. *Cole v. Chicago & N. W. R. Co.*, 38-311.

The fixing of cattle-guards at long distances beyond the switches and failing to fence between such guards and the switches cannot be regarded as setting apart that part of the main line as station or depot grounds, unless it be necessary for the purpose of transaction of business with the public that such part of the line remain unfenced. It is no reason for not fencing beyond such switch that in the operation of trains it would be inconvenient and possibly more hazardous to couple and uncouple cars if the track beyond the switches was fenced and provided with a cattle-guard. *Peyton v. Chicago, R. I. & P. R. Co.*, 70-522.

Negligence at depot grounds. As between the owner of cattle and the company, the latter cannot be required to keep a watch or guard at depot grounds, any more than it can be required to fence the same. *Smith v. Chicago, R. I. & P. R. Co.*, 34-506.

Speed at depot grounds. By this section a railroad company is liable for all stock killed on depot grounds by trains when running at a rate of speed greater than eight miles per hour; but if the stock is killed at a place where the company has a right to fence, although nearly adjacent to the depot grounds, the provisions as to the rate of speed have no application, and it is not negligence in the company that its trains are running at a higher rate of speed, even at such rate that they must necessarily enter on

the depot grounds running faster than eight miles an hour. *Monahan v. Keokuk & D. M. R. Co.*, 45-523.

The provision making the company liable for stock killed on depot grounds by trains running at a greater rate of speed than eight miles an hour applies only to cases where the stock is killed on such grounds. *Ibid.*

If by excessive speed upon the station grounds, animals are stampeeded and run upon the track, and without checking the speed, are run down and killed, the unlawful speed may be deemed the direct and proximate cause of the injury, although the actual injury does not occur upon the depot grounds. *Story v. Chicago, M. & St. P. R. Co.*, 79-402.

If the train comes upon the depot grounds at a greater rate of speed than eight miles per hour, a verdict for damages for stock killed may be sustained, although at the time of the injury to the stock the train had nearly stopped. The jury might be authorized in such case to find that the train would have been stopped entirely if it had entered the grounds at a rate of speed not exceeding the lawful rate. *Miller v. Chicago & N. W. R. Co.*, 59-707.

An ordinance regulating the rate of speed of cars within city limits is applicable to the switch yards of the company, and is not to be limited to places where the public have a right to travel. *Crowley v. Burlington, C. R. & N. R. Co.*, 65-658.

The fact that a train running at a higher rate of speed than is allowed at depot grounds, runs into a team which is being driven across the track in such grounds, will not render the company liable in double damages. *Johnson v. Chicago & N. W. R. Co.*, 75-157.

Fencing at highway crossings. The company is not required to fence where its track crosses a public highway, whether such highway be one *de jure* or only *de facto*. *Soward v. Chicago & N. W. R. Co.*, 33-386.

The company has no right to fence its line so as to obstruct a public street, whether such street is actually opened for public travel or not. *Long v. Central Iowa R. Co.*, 64-657.

A railway company has not the right to fence across platted streets and alleys within city or town limits, even though such streets or alleys are not opened or used. *Lathrop v. Central Iowa R. Co.*, 69-105.

A railroad corporation does not have a right to fence its track in cities and towns where it is intersected and crossed by streets and alleys. *Blanford v. Minneapolis & St. L. R. Co.*, 71-310.

But the company has the right to fence within the corporate limits of a town so far as its line runs through lands situated beyond streets or other highways, and it will be liable in damages for injuries to stock at such places if it has failed to fence. *Coyle v. Chicago, M. & St. P. R. Co.*, 62-518.

In a particular case, *held*, that an instruction that if the animal killed was the property of plaintiff, was running at large, and was injured by defendant outside of the station grounds, plaintiff would be entitled to recover, was erroneous, it not appearing but that the animal might have been killed at some point outside of the station grounds where defendant had no right to fence. *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58-622.

Negligence at highway crossings or depot grounds. The company is bound to use ordinary and reasonable care to avoid injuring stock at points where it is not required to fence. *Whitbeck v. Dubuque & P. R. Co.*, 21-103; *Balcom v. Dubuque & S. C. R. Co.*, 21-102.

The company is not liable in double damages under the statute for cattle killed at a place where it has no right to fence its track. *Soward v. Chicago & N. W. R. Co.*, 30-551.

Where an animal is killed on the depot grounds, negligence must be shown on the part of the company in order to make it liable. *Cleveland v. Chicago & N. W. R. Co.*, 35-220; *Plaster v. Illinois Cent. R. Co.*, 35-449.

In an action to recover for stock killed upon a railway the burden rests upon plaintiff to show that the injury was caused at a point where the company is required to fence its track. *Kyser v. Kansas City St. J. & C. B. R. Co.*, 56-207; *Comstock v. Des Moines Valley R. Co.*, 32-376.

Evidence considered and *held* sufficient to show that the animal killed was

struck at a highway crossing, and not in the field where the marks of blood were found. *Sullivan v. Wabash, St. L. & P. R. Co.*, 58-602.

In case of the killing of stock at a point where the railway has not the right to fence, the burden of proof is upon plaintiff to show negligence of the company. *Schneir v. Chicago, R. I. & P. R. Co.*, 40-337.

Where it appears that there was no negligence in operating the road, the owner of stock killed at a crossing in the night time cannot recover therefor. He must be considered to be at fault in allowing stock to run at large and on the crossing at such time. *Connyers v. Sioux City & P. R. Co.*, 78-410.

It appearing that injury to stock at a crossing in the night time could not have been avoided unless the speed of the train had been lessened to not more than fifteen miles per hour on approaching such crossing before the discovery of such stock, *held* that the company was not liable. It would be unreasonable to hold that public travel should be impeded by a requirement that night trains must be slowed down to fifteen miles per hour at every public crossing. *Ibid.*

The failure to give signals at crossings does not in itself establish negligence on the part of the company nor render it liable for stock killed at such crossings. In such cases it is necessary, in order to hold the company liable, that the jury find that the failure to give signals, under the circumstances, constituted negligence, and also that such negligence, if any, was the cause of the injury. *Jackson v. Chicago & N. W. R. Co.*, 36-451.

Under particular facts, *held*, that the company was not guilty of any negligence in connection with the injury received from its train to stock, at its crossing, and was, therefore, not liable. *Plaster v. Illinois Central R. Co.*, 35-449; *Schnheir v. Chicago, R. I. & P. R. Co.*, 40-337.

In a particular case, *held*, that there was not such absence of proof of negligence causing the injury to stock at a crossing, on the part of the company, as to require the setting aside of a verdict against it for damages. *Lawson v. Chicago, R. I. & P. R. Co.*, 57-672.

The fact that an engineer, in the exercise of his judgment, believes he can frighten stock from the track without reversing his engine or stopping the train, will not show that there is not negligence unless it appears that he possesses and exercises ordinary judgment. *Parker v. Dubuque Southwestern R. Co.*, 34-399.

In an action for negligence causing injuries to stock at a place where the company was not entitled to fence, *held*, that it was not improper to instruct the jury that, if defendant's employes saw the animal upon the track, and so near that it might reasonably be supposed, under all the circumstances, that the animal would be in danger, and could, by the use of ordinary care and prudence, have avoided the injury, and did not do so, the defendant was liable. *Edson v. Central R. Co.*, 40-47.

The question whether negligence is shown under such circumstance is one of fact for the jury. *Ibid.*

Negligence or wilful act of stock owner. Contributory negligence of stock owner, not amouning to a wilful act, will not defeat his right to recover for stock injured where the company has a right to fence. *Inman v. Chicago, M. & St. P. R. Co.*, 60-459.

The mere fact that the owner, by his voluntary act, exposes the animal to danger, will not necessarily make the act wilful. If the act of the owner was for a lawful purpose, and the danger was merely incidental, it should not be considerdd wilful so as to defeat recovery. *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58-622.

The statutory provision excludes all defenses in such cases except such as arise from the wilful act of the owner. This implies something more than mere negligence. It is an act in some way connected with the injury, such as driving live stock upon the track, or permitting the animals to escape for the purpose of going upon the track. *Ibid.*

The fact that the owner of swine allows the animals to run at large on his premises, in close proximity to the railroad track, does not constitute a wilful act such as to defeat his recovery. *Lee v. Minneapolis & St. L. R. Co.*, 66-131.

The act of the owner in permitting stock to run at large is not evidence of contributory negligence. *Whitbeck v. Dubuque & P. R. Co.*, 21-103; *Evans v. Burlington & M. R. R. Co.*, 21-374; *Stewart v. Burlington & M. R. R. Co.*, 32-561; *Searles v. Milwaukee & St. P. R. Co.*, 35-490.

The liability of the company for stock killed where it has a right to fence exists regardless of the negligence of the owner. It is only upon a showing that the injury is the result of the wilful act of the owner or his agent that the company is excused from liability. *Spence v. Chicago & N. W. R. Co.*, 25-139.

Where the owner knew that his animals had got upon the track, and had the opportunity and power to prevent injury thereto, but wilfully refused to do so, *held* that he could not recover. *Moody v. Minneapolis & St. L. R. Co.*, 77-29. .

When the land owner in the evening opened the wire fence along the right of way at a place which was not a crossing in order to put his animals into a field, and during the night the animals escaped at the same place upon the right of way and some of them were killed, *held*, that the company was not liable, and if the fence was insufficient at that place by reason of the lowest wire being too high from the ground, plaintiff could not recover after having himself taken down the wire and replaced it in its original position. *Davidson v. Central Iowa R. Co.*, 75-22.

While there may be facts justifying the opening of the fence along the right of way at a place not a crossing, yet where plaintiff does not make the claim in his petition as a ground of negligence on part of the company that the crossing is defective, he can not afterwards show that there was a ditch in such crossing as a reason for taking down the fence. *Ibid.*

In a particular case, *held* that it did not appear that the employees of a railway were negligent, after discovering animals which had come upon the track through the fence, in not avoiding injury to such animals. *Ibid.*

It is contributory negligence on the part of the owner of cattle to allow them to frequent places of danger such as depot grounds. *Smith v. Chicago, R. I. & P. R. Co.*, 34-506.

But where plaintiff allowed a blind horse to run at large and it was killed by defendant's train on its depot grounds, *held*, that the question whether plaintiff was guilty of contributory negligence was for the jury, and that such act was not, as a matter of law, negligence sufficient to defeat recovery. *Hammond v. Sioux City & P. R. Co.*, 49-450.

The fact that a party knowingly allows his animals to be upon and frequent depot and station grounds does not necessarily constitute contributory negligence such as to defeat recovery for injury to such animals. *Miller v. Chicago & N. W. R. Co.*, 59-707.

That a stock owner allows his stock to run at large with the knowledge that a crossing is dangerous, and that his animals frequent such crossing, does not constitute negligence even though the statute makes the owner liable for all damage resulting from his animals being at large. *Kuhn v. Chicago, R. I. & P. R. C.*, 42-420.

Where the owner of stock turned it loose upon the portion of his farm which was fenced, and it broke through the fence and strayed upon the railroad track, and it did not appear that the fence was not reasonably sufficient, *held*, that plaintiff, having no knowledge that his animals had escaped until they were killed, could not be considered guily of contributary negligence. *Moriarity v. Central Iowa R. Co.*, 64-696.

Stock unlawfully at large. The fact that sheep and swine are not allowed to run at large will not defeat the owner's right to recover for injuries to such animals. *Spence v. Chicago & N. W. R. Co.*, 25-139; *Stewart v. Chicago & N. W. R. Co.*, 27-282; *Fernow v. Dubuque & S. W. R. Co.*, 22-528; *Lee v. Minneapolis & St. L. R. Co.*, 66-131.

Where animals, allowed to run at large in violation of a city ordinance, come upon the track, they are trespassers, and the company owes no duty with reference to them, and is not liable for injuries received by them, even though occasioned by a train running at greater speed than eight miles per hour, it not appearing that such improper speed was wanton or reckless. *Van Horn v. Burlington, C. R. & N. R. Co.*, 59-33; *S. C.*, 63-67.

To defeat recovery from a railroad company for killing on its depot grounds an animal which it is unlawful to allow to run at large, it is necessary to show that the animal is at large by the owner's sufference. *Pearson v. Milwaukee & St. P. R Co.*, 45-497.

The fact that plaintiff's horse was at large in the night-time on the premises of another in violation of the herd law in force in the county, and was killed by defendant's train without fault or negligence of defendant, at a point where defendant had a right to fence, but did not, *held* not sufficient to defeat plaintiff's right of recovery. *Krebs v. Minneapolis & St. L. R. Co.*, 64-670.

It is not contributory negligence sufficient to defeat the owner's right of recovery that the animal is at large within the city limits in violation of an ordinance of the city, if it is at large by accident and not intentionally. *Doran v. Chicago, M. & St. P. R. Co.*, 73-115.

Setting out fires. The effect of the present statutory provision above referred to is not to make the company absolutely liable for damages from fires set out, but to render the injury *prima facie* proof of negligence on the part of the company, which may be rebutted by showing freedom from such negligence. *Small v Chicago, R. I. & P. R. Co.*, 50-338; *Slosson v. Burlington, C. R. & N. R. Co.*, 51-294; *Libby v. Chicago, R. I. & P. R. Co.*, 52-92.

The negligence of the company is presumed if the fire proceeds from one of its engines, and it is not necessary for the plaintiff in the first instance to prove more that that it did so proceed. *Rose v. Chicago & N. W. R. Co.*, 72-625.

In such case the presumption is that the corporation operating the road is guilty of negligence. It is not necessary for plaintiff to allege negligence, nor will such unnecessary allegation of negligence change the rule of proof. *Engle. v. Chicago, M. & St. P. R. Co.*, 77-661.

It is sufficient for plaintiff suing in such cases to set forth in his pleading simply the occurrence of the injury. The presumption of liability arising from the occurrence itself is not necessarily overcome by the proof merely that the company was not guilty of negligence in the matters which were the immediate cause of the injury, as permitting combustible material to accumulate and remain on the right of way. The burden of proving such fact is not upon plaintiff even though he may allege it in his petition. *Engle v. Chicago, M. & St. P. R. Co.*, 37 N. W. Rep.. 6.

This *prima facie* evidence may be rebutted by defendant, the effect of the statute being simply to change the burden of proof. As to whether the rebutting evidence showing due care, etc., on the part of the company is sufficient is a question for the jury and not for the court. *Babcock v. Chicago & N. W. R. Co.*, 62-593.

The good condition of the engine, the diligence of defendant's employees and other facts are evidence of care. When such evidence is introduced on the part of the defendant after the fact of the injury is proven by plaintiff, a conflict in the evidence arises which may be determined by the jury. *Ibid.*

The fact that the right of way is procured from the owner of the land does not preclude recovery of damages for fires set out in the operation of the railway to fences not then built and timber situated a mile from the track. Such damages could not have been considered in estimating damages in proceedings for condemning the right of way. *Rodemacher v. Milwaukee & St. P. R. Co.*, 41-297.

A railroad company is liable for damages from fire communicated by its negligence to a building of a third person and from such building to buildings of plaintiff, and negligence of the third person owning the intermediate building in not keeping it in the proper condition will not defeat plaintiff's right to recover. *Small v. Chicago, R. I. & P. R. Co.*, 55-582.

Company operating road The company whose engine sets out the fire is liable for the damages resulting, although it is operating a line owned and used by another company, and the fire originates on the right of way by reason of combustible matter allowed to accumulate thereon by such other company. *Slossen v. Burlington, C. R. & N. R. Co.*, 60-215.

Contributory negligence. Since the enactment of the provision relating

to liability for damages from fires, contributory negligence of the person injured cannot be shown as a defense. *West v. Chicago & N. W. R. Co.*, 77-654; *Engle v. Chicago, M. & St. P. R. Co.*, 77-661; *Johnson v. Chicago & N. W. R. Co.*, 77-666.

Prior to the enactment of this statutory provision on the subject it was held that contributory negligence of the owner of property destroyed by fire from the company's engines would defeat his recovery. *Kesee v. Chicago & N. W. R. Co.*, 30-78; *Garrett v. Chicago & N. W. R. Co.*, 36-121.

In cases decided after the enactment of this provision it was left undecided whether contributory negligence would defeat recovery and circumstances claimed to indicate contributory negligence were discussed. *Ormond v. Central Iowa R. Co.*, 58-742; *Slossen v. Burlington, C. R. & N. R. Co.*, 60-215.

Constitutional. These peculiar provisions as to liability of railway companies for damages from fires are not in conflict with the constitution, being applicable alike to all persons or companies engaged in such business. *Rodemacher v. Milwaukee & St. P. R. Co.*, 41-297.

Evidence. The frequent occurrence of fires caused by the same engine on the same trip may be shown for the purpose of proving that it was defective in its construction, or that it was out of repair or negligently handled. *Slossen v. Burlington, C. R. & N. R. Co.*, 60-215; *Lanning v. Chicago, B. & Q. R. Co.*, 68-502; *West v. Chicago & N. W. R. Co.*, 77-654.

But, in such a case, it is not competent to show that other fires occurred along the right of way in the same vicinity shortly after the engine passed over the road and before the fire that destroyed plaintiff's property. *Bell v. Chicago, B. & Q. R. Co.*, 64-321.

Plaintiff, in introducing evidence to rebut the evidence of the railway company tending to show want of negligence on its part causing fire set out by its locomotives, may do so by facts of a circumstantial character, as it is not usually possible to introduce witnesses who can testify from personal knowledge. Therefore evidence which might not be free from difficulties in other cases, open to clearer proofs, might be considered sufficient. *Babcock v. Chicago & N. W. R. Co.*, 62-593.

In an action by the tenant to recover the value of a crop destroyed by fire set out by the company's engines, it appearing that plaintiff did not pay cash rent, *held* error to refuse to allow plaintiff to be cross-examined as to whether he was to give a share of the grain for rent. *Ormond v. Central Iowa R. Co.*, 58-742.

Evidence in a particular case *held* to sufficiently show that the fire causing the damage complained of originated from the defendant's engines. *Johnson v. Chicago & N. W. R. Co.*, 77-666.

An instruction that "the fact that defendant set out a fire upon its right of way * * * is not evidence that such fire communicated itself to and burned the house of plaintiff," *held* to be misleading, for the reason that such fact was properly to be treated as evidence tending to establish the destruction of plaintiff's property by a fire set out by defendant. *Fish v. Chicago, R. I. & P. R. Co.*, 46 N. W. Rep., 998.

Ownership of property. Where plaintiff suing to recover for destruction of hay by fire set out by defendant in the operation of its road, showed that such hay was cut and stacked upon land leased by him from the person claiming to be owner thereof, *held*, that he was entitled to recover without proving title in his landlords, there being no adverse claim made. *Johnson v. Chicago & N. W. R. Co.*, 77-666.

Where it appeared that plaintiff had as a trespasser cut and stacked hay upon the land of another which he had no title to, and of which he was not in possession, *held*, that he could not maintain an action against a railroad company for its negligence resulting in the destruction thereof by fire. *Murphy v. Sioux City & P. R. Co.* 55-473; *Lewis v. Chicago, M. & St. P. R. Co.*, 57-127; *Comes v. Chicago, M. & St. P. R. Co.*, 78-391.

Negligence Before the enactment of this statutory provision, it was held that the burden of proof in an action against the company for such damages was upon plaintiff to show negligence of the company, and that proof of the injury alone was not sufficient to make out a *prima facie* case. *Gandy v.*

Chicago & N. W. R. Co., 30-420; *McCummons v. Chicago & N. W. R. Co.*, 33-187; *Garrett v. Chicago & N. W. R. Co.*, 36-121.

But in such a case, *held*, that as in the nature of the case plaintiff must labor under difficulties in making proof of the fact of negligence, and as that fact itself is always a relative one, it might be satisfactorily established by evidence of circumstances bearing more or less directly upon the fact of negligence, and which might not be satisfactory in other cases, free from difficulty and open to clear proof. *Gandy v. Chicago & N. W. R. Co*, 30-420.

A party using a dangerous instrument, body or element will be held to use greater care and prudence than when using a less destructive agency. Fire being a destructive element, persons using it are required to exercise all reasonably careful precautions against its spread, and the care and prudence required by law to prevent the spread of fire from a locomotive are not deemed to be exercised unless some proper precautions are used for that purpose. *Jackson v. Chicago & N. W. R. Co*, 31-176.

Ordinary care and prudence requires the use of the best contrivances known, and unless such are used it will be considered negligence; but what amounts to negligence in such cases is a question of fact for the jury. *Ibid.*

Also *held*, that to allow dried grass, weeds and other matter, the natural accumulations of the soil, to remain upon the right of way, was not negligence *per se* but that there might be such peculiar or unusual circumstances in a given case as that such acts would amount to negligence in fact, and that when such circumstances existed they might properly be submitted to the jury to establish the fact of negligence. *Kesee v. Chicago & N. W. R. Co.*, 30-78.

Also *held*, that the question of negligence, such as to render the company liable for damages resulting from such fires, was to be determined by the jury, and that it was not proper to enumerate facts and circumstances which as a matter of law would be sufficient to charge the company with negligence. *McCormick v. Chicago, R. I. & P. R. Co.*, 41-193.

Personal injuries to plaintiff received in passing through a fire set out by defendant's engine, in a reasonable attempt to get horses from a neighbor's barn threatened by such fire, *held* to be the proximate result of the fire in such way as to render defendant liable therefor. *Liming v. Illinois Central R. Co.*, 47 N. W. Rep., 66.

Interest. It is not error to direct the jury to add to the value of the property destroyed six per cent per annum interest from the time of such destruction. *Johnson v. Chicago & N. W. R. Co.*, 77-666.

1973. Fences required. 22 G. A., ch. 30, § 1. All railroad corporations organized under the laws of this State, or any other State, owning or operating a line of railroad within this State, which have not already erected a lawful fence, shall construct, maintain and keep in good repair a suitable fence of posts and barb wire, or posts and boards on each side of the tracks of said railroad within the State of Iowa, and so connected with cattle-guards at all public highway crossings as to prevent cattle, horses and other live-stock from getting on the railroad tracks. Said railroad tracks to be fenced by said railroad companies on or before January first, 1890, where the railroads are now built, and within six months after the completion of any new railroads, or any part thereof, the said fences to be constructed either of five barbed wires, securely fastened to posts, said posts to be not more than twenty feet apart, and not less than fifty-four inches in height, or of five boards securely nailed to posts, said posts to be not further than eight feet apart, and said fence to be not less than fifty-four inches in height. *Provided*, when said railroad corporations, who have now their fences built shall when they rebuild or repair their fences the same shall be built as provided in this act; *Provided* further, that any other fence which in the judgment of the fence viewers is equivalent to the fence herein provided shall be a lawful

fence. *Provided* however that this act shall not be so construed as to compel a railway company operating a third-class railway to fence its road through the land of any farmer or other person, who by written agreement with said company has waived or may waive the fencing of said road through such land. *Provided* further however, that at any points where third-class roads are not released by written agreement, from building fence as herein provided for, and fences are built on both sides of railway track at such points, cattle-guards shall be so constructed at such points as to prevent stock from going upon said track so fenced.

1974. Penalty. 22 G. A., ch. 30, § 2. If any corporation or officer thereof or lessee owning or engaged in the operation of any railroad, in this State, neglect or refuse to comply with any provision of section one of this act [§ 1973], such corporation, officer or lessee, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding five hundred dollars for each and every offense. And every thirty days' continuance of such refusal or neglect shall constitute a separate and distinct offense within and for the purposes of this act.

***Class C railways.** 23 G. A., ch. 20, § 1. That section two of chapter thirty of the acts of the Twenty-second general assembly, be amended by adding thereto the following:

The time fixed in this act for fencing railways, shall not apply to railway companies owning or operating third-class or class "C" railways, as classified by the railroad commissioners. Such railway shall be fenced as follows: twenty-five per cent of the entire length of the road not including any fencing already done shall be fenced, as herein provided, during the year 1890, and twenty-five per cent of such entire length each year thereafter, until the whole thereof is fenced.

Penalties remitted. 23 G. A., ch. 20, § 2. All penalties and fines which have been heretofore incurred under said chapter thirty by any railway company owning or operating a third-class or class "C" railway, or by any officer or lessee thereof, by reason of a failure to fence according to the provisions of said chapter thirty of the acts of the Twenty-second general assembly, are hereby released and remitted, and no suit or prosecution shall be instituted by reason of any such failure; but nothing herein contained shall be construed to exempt any such railway company, lessee or officer, from the fines and penalties provided in said act, if any such road is not fenced in compliance herewith.

1975. Killing of Stock. 22 G. A., ch. 30, § 3. Nothing herein contained shall relieve said railroad corporation from pecuniary liability arising from the killing or maiming of live stock on said track or right of way by said corporation, that may occur through the negligence of said corporation or its employees, and *provided* further, that nothing in this act shall be construed so as to interfere with the right to open or private crossings, as now maintained, or with the right of persons to such crossings. *Provided* further, that nothing in this act contained shall in any way limit or qualify the liability of any corporation or person, owning or operating a railway, that fails

*This act of the Twenty-third general assembly containing this and the following sections is entitled, "An act to amend chapter thirty of the laws of the Twenty-second general assembly, and to remit certain penalties incurred thereunder," and took effect by publication April 16, 1890.

to fence the same against live stock running at large, for any stock injured or killed by reason of the want of such fence as now provided for in section twelve hundred and eighty-nine of the Code of 1873 [§ 1972].

1796. Railway crossings near Mississippi river. 1290. Whenever it becomes necessary in the construction of any railway to cross any other railway near the shore of the Mississippi river, each shall be so constructed and maintained at the point of crossing. so that the respective road-beds thereof shall be above high water in such river. But where such crossings occur within the limits of cities containing six thousand inhabitants as shown by the last preceding census, the city council of such cities may establish the grade at such crossings. [14 G. A., ch. 33.]

CONDITIONS OF AID TAX.

1977. How changed. 1291. In all cases where taxes have been voted under chapter forty-eight, of twelfth general assembly, or chapter one hundred and two of thirteenth general assembly, to aid in the construction of any railway, or where said tax has been transferred under chapter eighty-one of the fourteenth general assembly, and said tax has been voted or transferred under any condition or contract with the railway company which the township may desire to have changed or modified, said township is hereby authorized upon agreement of its trustees with the railway company constructing said proposed railway, to submit to a vote of the electors of the township, the question whether the conditions or contract under which said tax was voted or transferred, shall be changed or modified, and said trustees, upon petition of one-third of the legal voters of the township, as shown by the vote cast at the last general election, asking such change or modification, shall order an election, submitting the agreement to the electors, at a special election called therefor, said election to be conducted in all respects as to notice and manner of holding, as the election at which the tax was originally voted.

In general, as to conditions imposed in voting a tax in aid of the construction of a railway, see § 2085.

FOREIGN COMPANIES.

1978. Privileges; filing articles. 18 G. A., ch. 128, § 1. Any railroad company organized, or created by, or under the laws of any other state, and owning and operating a line or lines of railroad in such state, is hereby authorized to extend and build its road or any branches thereof into the state of Iowa. And such railroad company shall have and possess all the powers, franchises, rights and privileges, and be subject to the same liabilities of railroad companies organized and incorporated under the laws of this state, including the right to sue, and the liability to be sued, the same as railroads organized under the laws of this state; *provided*, such a railroad corporation shall file with the secretary of the state of Iowa, a copy of its articles of incorporation, if incorporated under a general law of such state, or a certified copy of the statute laws of such state incorporating such company, where the charter of such railroad corporation was granted by statute of such state.

Even though this section secures to a foreign railway the right of personal service in proceedings to establish a highway, in the same manner as it is secured to a railway company existing under the laws of the state, yet as a domestic railway company which does not appear from the transfer books to be the owner of the land need not be personally served, so a foreign railway company is in no better position in that respect. *State v. Chicago, M. & St. P. R. Co.*, 80–586.

Foreign railway companies under this section are not entitled to the rights and privileges therein granted unless a copy of their articles of incorporation or charter is filed with the secretary of state. *Ibid.*

RELOCATION.

1979. Petition for. 16 G. A., ch. 118, § 1. Any railroad company desiring to change or remove the line of its road, after the same has been permanently located and constructed, may for that purpose file a petition in the district [or circuit] court in any one of the counties wherein the change or removal is proposed to be made, describing with convenient accuracy that portion of its line of road which said company seeks to have changed or removed, and asking the court to grant the right or authority to make such change or removal. To this suit, all trustees, mortgagees, or other lien holders, and all townships, cities and counties which have aided by taxation to build the road, must be made defendants by service of original notice, in the time and manner as provided by law for service of original notices.

1980. Notice. 16 G. A., ch. 118, § 2. In addition to the foregoing notice, a public notice to all whom it may concern, of the time of filing such petition and of the object thereof and of the term of court at which the application for authority to make the change will be made, and requiring all persons desiring the repayment of money or the return of property, as in this act contemplated, to appear at such court and make good their claim therefor, must be published in a newspaper printed in each county wherein the change is to be made, for a period of ten successive weeks before the term of court at which the application is to be made. The court may order any additional notice or publication that it may deem proper.

1981. Conditions. 16 G. A., ch. 118, § 3. But no railroad company shall be allowed to change or remove the line of its road after its permanent location and construction, without repaying to the proper parties all moneys, and restoring all property, or its value, which were given or donated to the company building the same, exclusively in consideration of the said railroad's being located and constructed on such line, nor without first procuring the proper consent of all parties having liens upon said railroad; and also of any township, city or county that has by taxation or by the issuing of bonds contributed money to aid in the construction thereof; *provided*, that the consent of such township, city or county shall be necessary with reference only to the change to be made within its own territorial limits.

The obligation to operate a railway is incurred by accepting taxes. *State v. Central Iowa R. Co.*, 71–410.

1982. Order of court. 16 G. A., ch., 118, § 4. If the court is satisfied that due and proper notice has been given, and that the consent of the proper parties, as herein contemplated, has been duly obtained, it shall

order and adjudge in favor of all persons who have appeared and established their claims thereto, the repayment of all moneys, and the return of all property, or its value, which were given or donated to the company exclusively in consideration of the roads being located on the line from which it is proposed to make the removal, and shall declare and adjudge all persons not so appearing and establishing their claims as aforesaid, forever thereafter debarred and estopped from setting up or asserting the same. The court may, if the public interest demand it, make an order authorizing the railroad company to change or remove the location of its road, as asked for in the petition, but such order must be on the condition that all claims for the repayment of money, or the return of property, which may be allowed by the court, as herein provided, shall be first paid or satisfied.

1983. Effect. 16 G. A., ch. 118, § 5. All mortgage liens or other incumbrances on the line of road which the company is authorized by the court to change, shall be and remain valid liens and incumbrances on the line of road to which the change is made, and shall take priority of all other liens and incumbrances upon such new line of road.

1984. Notice. 16 G. A., ch. 118, § 6. For the purpose of this act, the trustees of each township shall be served with notice, and shall be authorized to represent and act for their respective townships; *provided*, that no vested right of any person or persons, living on and along the line of any railroad removed under the provisions of this act, shall be defeated or affected by this act; *and provided further*, that the provisions of this act shall apply only to such railroads as were constructed prior to the year 1866.

1985. Cuts and banks. 16 G. A., ch. 118, § 7. When any railroad company shall take up their track and relocate the same under the provisions of this act, shall fill up the cuts and level down the banks, or cause the same to be done, within two years from the time of taking up such track.

1986. Provisions not to apply. 17 G. A., ch. 152, § 1. The provisions of section seven, of chapter one hundred and eighteen, of the laws of the sixteenth general assembly [§ 1985], shall not apply to any railroad which has its initial point at any town upon the Mississippi river, and which had in the year 1859, sixty-three miles and no more of completed track from such initial point, and provided that the exemption from the provisions of said section shall only apply a distance of sixty-three miles from the initial point of any such railroad.

CONNECTIONS.

1987. Required. 1292; 15 G. A., ch. 18. Any railway corporation, operating a railway in this State, intersecting or crossing any other line of railway, of the same gauge, operated by any other company, shall, by means of a Y, or other suitable and proper means, be made to connect with such other railway so intersected or crossed; and railway companies where railroads shall be so connected shall draw over their respective roads the cars of such connecting railway; and also those of any other railway or railways connected with said roads made to connect as aforesaid, and also the cars of all transportation companies or persons, at reasonable terms, and for a compensation not exceeding their ordinary rates. [9 G. A., ch. 158, § 1.]

1988. Commission to adjust rates. 1293; 15 G. A., ch. 18. When such corporations are unable to agree upon the method and terms of connection and rates of transportation, either, or any person interested in having such connection made, may make application to the district [or circuit] court in any county in which said connection may be desired or located, or to the judge of said courts if in vacation, after ten days' notice in writing to the companies. After hearing the parties, or on default, the said judge shall appoint three disinterested persons, being presidents or superintendents of railways, or experts in railway business, without regard to their place of residence, as commissioners, to determine the method and terms of connection and rules and regulations necessary thereto; *provided*, that the rates fixed by the said commissioners, for freights offered or transported in the cars of the company offering the same, shall in no case exceed the local rates per mile fixed by law or set forth in the carrying companies' freight tariff prepared and made public in accordance with the laws of the state. [Same, § 2.]

1989. Report of. 1294. Said commissioners shall meet at such time and place as may be ordered by said court or judge, and shall hear the parties and any testimony brought before them, and make and sign their report, prescribing the things to be done. Such report made by them, or a majority of them, shall, within such time as ordered by said court or judge, be returned to and filed in said court, to be confirmed thereby; and, when so confirmed, it shall be binding upon the parties until another report shall be made upon a new application, which cannot be made within two years after such confirmation. [Same, § 3.]

1990. Duty, power and compensation. 1295. Said commissioners shall have such compensation as shall be deemed reasonable by the court, and shall be goverened by the same rules and have the same power in compelling the attendance of witnesses, and shall themselves be sworn, as is now provided in cases of referees in civil actions at law in the district court, and exceptions may be taken to their report in the same manner; and such exceptions shall have the same effect, and the proceedings upon their report shall be the same as on reports of referees in cases referred from said court, and the costs shall be paid by the parties in such proportion as to the court may seem equitable and just. [Same, § 4.]

1991. Penalty. 1296. If the officers of, or any person in the employ of said corporation, refuse to comply with the terms of such confirmed report, they may be punished as for a contempt of said court. [Same, § 5.]

DIVISION OF EARNINGS.

1992. Pooling; penalty. 1297. It shall be unlawful for any railway company to make any contract, or enter into any stipulation with any other railway company running in the same general direction, by which either company shall, directly or indirectly, agree to divide in any manner or proportion the joint earnings upon the whole or any part of the freight transported over such roads, and any violation of this provision shall render the railway company violating the same, liable to a penalty of five thousand dollars for each month for which such earnings are divided, to be recovered for the use of the permanent school fund in the name of the state.

1993. Drawback. 1298. Contracts between any such corporations operating a railway, allowing a drawback of not exceeding fifteen per cent. on the gross earnings of the railway on business coming from or going to any other railway, shall be legal and binding. [10 G. A., ch. 86, § 1.]

1994. Same. 1299. Any such corporation owning and operating a railroad partially constructed, may, for the purpose of inducing the investment of capital in the extention or completion of its railway, contract with the party furnishing such means, or the trustees who may represent them, allowing a drawback not exceeding twenty per cent. of the gross earnings of all business coming from and going to any part of the extention or portion to be aided or completed with the money or means thus obtained; or such railway company may lease of the trustees or said parties, the portion to be built with means thus furnished, subject to the same rights and liabilities as are provided in the next section. [Same, § 2; 14 G. A., ch. 39.]

SALE; LEASE; JOINT ARRANGEMENT.

1995. Connecting line. 1300. Any such corporation may sell or lease its railway property and franchises to, or make joint running arrangements with, any corporation owning or operating any connecting railway, and the corporation operating the railway of another, shall, in all respects, be liable in the same manner and extent as though such railway belonged to it, subject to the laws of this state. [10 G. A., ch. 86, § 4.]

Where a line of road has been built by aid of taxes and levied for that purpose, the line in aid of which the tax is voted must be operated as a whole, and a portion thereof cannot be leased and operated seperately to the injury of any locality on the line. Any railroad company availing itself of such aid assumes relations to the public different from those resulting from a mere private contract. *State v. Central Iowa R. Co.*, 71–410.

Further as to this section, see *Treadway v. Chicago & N. W. R. Co.*, 21–351; and, in general, notes to § 1957.

1996. Mortgage. 1301. Any contract, lease or benefit derived therefrom, contemplated in either of the three preceding sections, may be mortgaged for the purpose of securing construction bonds in the same manner as other property of the corporation, [Same, § 3.]

Where a railroad has been constructed by the aid of taxes the obligation to operate it as an entire line attaches to it in the hands of a purchaser thereof at sale under foreclosure. *State v. Central Iowa R. Co.*, 71–410.

STOCK IN NEW CORPORATION.

1997. When name or ownership changed. 1302. Where any railway company shall be organized under a corporate name, and shall have made contracts for payments to it upon delivery of stock in such company, and shall, subsequent to such contracts, have changed their corporate name, or when the real ownership in the property, rights, powers, and franchises have passed legally or equitably, into any other company, no such contracts shall be enforced in law or equity until tender or delivery of stock in such last named corporation or company.

Cases are contemplated in this section where payments are to be made to the company upon delivery of stock, and it also contemplates that the

ownership of property rights, powers and franchises may legally pass to another company while such contracts for payments exist. The section embraces obligations for payment of taxes voted, and also voluntary conveyances by one company to another, in which the delivery of stock to taxpayers shall be provided for. Therefore, *held*, that a transfer by the company in whose favor a tax was voted to another company does not forfeit the tax voted, stock in the new company of equal or greater value than that of the company to whom the tax was voted being offered to the taxpayer. *Cantillion v. Dubuque & N. W. R. Co.*, 78-48; and see notes to § 2086.

REPORTS OF COST OF CONSTRUCTION.

1998. To general assembly. 1303. When any railway has been completed and opened for use, the corporation constructing the same shall report to the next general assembly, under oath, the total cost thereof, specifying the amount expended for construction, engines, cars, depots, and other buildings, and the amount of all other expenses, together with the length of the railway, the number of planes, with their inclination to the mile, the greatest curvature, the average width of grade, and the number of ties per mile. [9 G. A., ch. 169, § 1.]

MAXIMUM RATES.

1999. Schedule posted. 1304. In the month of June in each year, every corporation operating a railway in this state shall fix its maximum rates of fare for passengers and freight, for transportation of timber, wood, and coal, per ton, cord, or thousand feet per mile; also its fare and freight per mile for transporting merchandise and articles of the first, second, third and fourth classes of freight; and, on the first day of July following, shall put up at all the stations and depots on its railway, a printed copy of such fare and freight, and cause a copy to remain posted during the year. For wilfully neglecting so to do, or for wilfully receiving higher rates of fare or freight than those posted, the company shall forfeit and pay to the State of Iowa, for the use of the school fund, not less than one hundred dollars nor more than two hundred dollars, to be recovered in any civil action in the name of the state; and it is hereby made the duty of the several district [county] attorneys within their respective districts [counties] to sue for and recover all sums forfeited as aforesaid; and such corporation shall also forfeit and pay to the person injured, double the amount of compensation or charge illegally taken, to be recovered by such person in a civil action [9 G. A., ch. 169, § 2; 13 G. A., ch. 139.]

A former statute, similar to this section, considered and *held* not to be in conflict with the U. S. Const., as being an attempt to regulate commerce between the states. *Fuller v. Chicago & N. W. R. Co.*, 31-187.

Under such statute, *held*, also, that the receiving of higher rates than those posted subject the company to the penalties imposed by the statute without it being shown that such overcharge was wilful. *Fuller v. Chicago & N. W. R. Co.*, 31-211.

2000. Maximum passenger fare. 1305. For the transportation of passengers, no railway company shall charge to exceed three and one-half cents per mile per passenger.

The application of this section is limited by the provisions of § 2022.

REGULATION OF RATES.

2001. Rights reserved. 1306. All contracts, stipulations, and conditions, regarding the right of controlling and regulating the charges for freight and passengers upon railways, heretofore made in granting land or other property or voting taxes to aid in the construction of, or franchises to, railway corporations, are expressly reserved, continued and perpetuated in full force and effect, to be exercised by the general assembly, whenever the public good or the public necessity requires such exercise thereof.

[In next to the last line, the word "and" is erroneously inserted in the printed Code in place of "or."]

NEGLIGENCE OR WRONGS OF EMPLOYES.

2002. Liability for; co-employes. 1307. Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the willful wrongs, whether of commission or omission of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding. [9 G. A., ch. 169, § 7; 13 G. A., ch. 121; 14 G. A., ch. 65.]

In general. Without this statutory provision the company would not be liable to an employee for injuries resulting from negligence of a co-employee, and the intention of the statute is merely to give to the employee a right of action in such cases, and not to change the degree of care necessary, which is, as between master and servant, that of ordinary care and diligence only. *Hunt v. Chicago & N. W. R. Co.*, 26–363.

The company is liable to an employee for damages resulting from the negligence of a co-employee whose duty it was to keep a bridge in order, in the performance of such duty. *Locke v. Sioux City & P. R. Co.*, 46–109.

Person or company operating railway. A receiver who is managing a railway under the direction of a court is within this section and may be charged, and a recovery obtained against him, as a person operating a railway. And though his liability could not be personal, a judgment against him might be satisfied out of the property in his hands if the court by whom he was appointed should so direct. *Sloan v. Central Iowa R. Co.*, 62–728.

The fact that a lessee may be held liable under this section does not prevent recovery against the owner of the road. The actions are cumulative. *Bower v. Burlington & S. W. R. Co.*, 42–546.

The running of special trains over the railway by a construction company in constructing it is operating a railroad within the meaning of the statutory provision. *McKnight v. Iowa & M. R. Constr. Co.*, 43–406.

Persons not employees. The language of the section is so broad that it includes any and all persons, employees and others, who may be injured by the negligence of the agents or servants of the railway company or persons operating the railway. *Rose v. Des Moines Valley R. Co.*, 39–246.

If the act of the employees is within the scope of his authority the company is liable for injuries therefrom to a third person, even though the act is wilfully wrongful. *Marion v. Chicago, R. I. & P. R. Co.*, 64–568.

If the employes perform their duty in operating a train in a manner so unusual or reckless as to endanger lives of persons upon the train they are guilty of negligence, and if in direct consequence of such negligence a person is injured the company will be liable even though the person was on the train without right. This section renders the company liable for all damages sus-

tained by any person in consequence of the neglect of agents. *Way v. Chicago, R. I. & P. R. Co.*, 73-463.

It is not material that plaintiff, claiming to recover by virtue of this section, was not employed in the operation of the road. It is sufficient if it appears that he was injured by the operation of the road and by negligence of the parties charged with responsibility with respect to the movement of trains. *Pierce v. Central Iowa R. Co.*, 73-140.

Employees engaged in operating road. This section affords a remedy only to such employees as are employed, at the time of receiving the injury, in the business of operating a railroad. *Malone v. Burlington, C. R. & N. R. Co.*, 65-417.

So that to entitle an employe to recover against the company for injuries which he has sustained, he must show, first, that he belonged to the class of employees to whom the statute affords a remedy, and, second, that the company which occasioned the injury was of a class of companies for which the remedy is given. *Ibid.*

Therefore, *held*, that an employe whose duty was to wipe off engines, open and close the doors of the engine house, and remove snow from the turntable and tracks and operate the turn-table, and who was injured by reason of the negligence of a co-employee causing the door of the engine house to fall upon him, was not engaged in the operation of the road in such a sense as to be within the statutory provisions. *Ibid.*

The change from the common law made by this section extends no further than to employees engaged in the business of operating a railway, and not to persons employed by the corporation without regard to the nature of their employment. Such corporation may be engaged in any other business, which may be within the scope of their organization, but not at all, or very remotely, connected with the use of the road, and in such cases employees by whom such affairs are conducted acquire no rights under the statutory provision, as their occupation does not expose them to the hazards incident to the use of railways, and the statute was not designed for their protection and benefit. *Schroeder v. Chicago, R. I. & P. R. Co.*, 41-344.

It is error for the court to instruct the jury that, as a matter of law, the nature of plaintiff's service and employment bring him within the terms of the statute. The character of his employment, whether in connection with the use of defendant's railroad, or whether thereby he is brought within the provisions of the statute, are questions of fact to be determined by the jury. *Ibid.*

The statutory provision applies no further than to employees engaged in the business of operating a railroad, and does not apply to employees in a machine-shop of the company. In such case the common-law rule exempting an employer from liability for injury to an employee resulting from the negligence of a co-employee is still in force. *Potter v. Chicago, R. I. & P. R. Co.*, 46-399.

The words "where such wrongs are in any manner connected with the operation or use of any railway" apply not only to wilful wrongs, but also to negligence of agents, etc., and in order to entitle an employee to recover for injuries received from a co-employee, it must appear that he was engaged in a service connected with the use and operation of the railroad. *Foley v. Chicago, R. I. & P. R. Co.*, 64-644.

Therefore, *held*, that an employe whose duty it was to repair cars while standing upon the track and side track of the company, while not in motion, and who was sometimes required to ride on the trains of the company from place to place for the purpose of making such repairs at different places, was not employed in the operation of the road in such sense as to bring him within the protection of the provision. *Ibid.*

Injuries to one employe by reason of negligence of another, both engaged in the work of repairing a track, such injury not resulting from the operation of the railroad, *held* not within the provisions of the statute. *Matson v. Chicago, R. I. & P. R. Co.*, 68-22.

Employees engaged in hoisting coal in a coal-house for the purpose of filling a car are not so engaged in the hazardous business of operating a railroad as

that one can recover for injuries caused by the negligence of the other. *Luce v. Chicago, St. P., M. & O. R. Co.*, 67–75.

In order to render a company liable for injuries to an employee by reason of negligence of a co-employee, the negligence complained of must be that of an employee and a co-employee, who are in some manner performing work for the purpose of moving a train, as loading or unloading it, or superintending, directing or aiding its movement. The persons must be connected in some manner with the moving of trains. Work preparatory thereto, which may be done away from the train, is not connected with its movement. *Stroble v. Chicago, M. & St. P. R. Co.*, 70–555.

Therefore, *held*, that where employees were engaged about elevating coal to a platform to supply the engine, their duties were not so connected with the use and operation of the railroad as that one of them could recover for injuries received from negligence of the other. *Ibid.*

Where a section hand was injured by the negligence of a co-employee while engaged in loading a car, *held*, that it did not sufficiently appear that his employment was of such character as to entitle him to recover. *Smith v. Burlington, C. R. & N. R. Co.*, 59–73.

Where an employee was injured by appliances connected with the round-house, *held*, that it was not error to instruct the jury that if they found it was a part of plaintiff's duty to keep such appliances in a safe condition, or that it was the duty of another employee of the same kind to do so, and they both, or either of them, neglect to do so, then the plaintiff could not recover, the employees not being engaged in the operation of the road. *Manning v. Burlington, C. R. & N. R. Co.*, 64–240.

A person engaged in working on a bridge of the company and required, in the course of his employment, to ride on its trains, is within the statutory provision. *Schroeder v. Chicago, R. I. & P. R. Co.*, 47–375.

And so is a section hand. *Frandsen v. Chicago, R. I. & P. R. Co.*, 36–372.

And so is a hand engaged in shoveling gravel from a gravel train. *McKnight v. Iowa & M. R. Constr. Co.*, 43–406.

Or a hand engaged in connection with the operation of a dirt train. *Deppe v. Chicago, R. I. & P. R. Co.*, 36–52.

Where the plaintiff was employed on a train used for hauling sand, and was injured by the falling of a bank of sand where he had been shoveling, *held*, that the case was within the provisions of this section. *Handelun v. Burlington, C. R. & N. R. Co.*, 72–709.

An employee required to go upon a train for the purpose of unloading cars is within the scope of this section and may recover for injuries received by reason of negligence of a co-employee. *Raben v. Central Iowa R. Co*, 73-579.

Where the employee was injured while engaged in operating a derrick situated on a flat car, the operation of which involved the movement of the car upon the track, *held*, that he was within the scope of this section. *Nelson v. Chicago, M. & St. P. R. Co.*, 73–576.

Where plaintiff's duties required him to ride on the train as snow-shoveler, and at the time of receiving an injury he was on the train in the discharge of the duties of his employment, riding from place to place where his services were required, *held* that the company was liable for such injury received from stepping on the train at an unsafe place, where such act was occasioned by the negligence of the employees in charge of the train. *Smith v. Humeston & S. R. Co.*, 78–583.

A private detective injured while walking along the track, in accordance with directions of the company, to a certain place where he was to try to detect persons accustomed to place obstructions on the track, and who, while so walking to the place designated, was prostrated by sunstroke on the track and negligently run over and injured by defendant's engine, *held* to be so engaged as to subject him to the hazard peculiar to the business of operating a railway, and to be within the protection of the statutory provision. *Pyne v. Chicago, B. & Q. R. Co.*, 54–223.

A section hand, while riding on a hand car holding a shovel for the purpose of clearing snow from the rail, is engaged in the operation of the road within the provision of this section, so as to be entitled to recover for injuries

received by reason of negligence of the foreman in charge of the car. *Chicago, M. & St. P. R. Co. v. Artery* (U. S. S. C.), 11 S. C. Rep., 129.

Injury to foreman from negligence of subordinate. The fact that an employee of a railroad company is the foreman of a crew of workmen with power to direct the men under him in their work and to hire and discharge them at will does not prevent his being a co-employee with such workmen, within the meaning of this section, and he may recover for injuries received from the negligence of the men in his employ. *Houser v. Chicago, R. I. & P. R. Co.*, 60-230.

Contributory negligence. This statutory provision does not exonerate the injured party from the necessity of exercising reasonable care. Its purpose is to extend the liability of railroads to injuries to employees for which, at the common law, they were not liable. *Murphy v. Chicago, R. I. & P. R. Co.*, 45-661

In case of death. Where the injury results in death, the company is liable to the personal representatives of deceased. *Philo v. Illinois Cent. R. Co.*, 33-47.

Constitutionality. This provision is not unconstitutional, as subjecting railroad corporations to penalties and liabilities other than those imposed on other business corporations engaged in a like business; being applicable to all persons or corporations engaged in a peculiar business it is not open to such objection. *McAunich v. Mississippi & M. R. Co.*, 20-338; *Deppe v. Chicago, R. I. & P. R. Co.*, 36-52; *Bucklew v. Central Iowa R. Co.*, 64-603; *Pierce v. Central Iowa R. Co.*, 73-140; *Raben v. Central Iowa R. Co.*, 73-579.

Liability of company for negligence of superior or inferior employee. If the employee of a railroad company is injured while riding on a hand-car, through the negligence of the boss in charge thereof, the company is liable. *Hoben v. Burlington & M. R. R. Co.*, 20-562.

Instructions based upon the hypothesis that a person for whose death damages were sought to be recovered from the company for injuries received while acting in obediance to the directions of an employee having authority to control him, *held* applicable where deceased was a fireman accompanying the engineer and discharging his duty while upon the engine under the control of such engineer. *Cooper v. Central R. of Iowa*, 44-134.

Where an accident by which an employee is injured is caused by the act of an inferior employee acting under the direction of such superior, the latter cannot recover for an injury received. *Dewey v. Chicago & N. W. R. Co.*, 31-373.

Where the forman of a crew of men employed by the company in the repair of bridges brought action against the company for injury received from negligence of one of the men under his control, *held*, that the fact that he was in charge of the workman did not defeat his right to recover for such negligence under the statute (referred to below) giving a right of action for the negligence of a co-employee. *Houser v. Chicago, R. I. & P. R. Co.*, 60-230.

It may be that a mere foreman, as the word is generally understood, that is, a laborer with power to superintend the labor of those working with him, is a co-employee so far as his own mere labor is concerned, but it is error to exclude from the jury the consideration of the question whether there is a negligence of such foreman, acting as a superior. *Baldwin v. St. Louis, K. & N. R. Co.*, 68-37.

Release of Claim. A written release of all claim for damages resulting from an injury, executed for a consideration, will be binding on the person injured in the absence of fraud, even though it is not read over by him before signing it. *Gulliher v. Chicago, R. I. & P. R. Co.*, 59-416.

Contract. A written contract between a company and an employee by which he agrees to hold the company harmless for injuries received in doing certain acts which he is advised are dangerous is admissible for the purpose of showing the existence of the rule on the subject, and notice of it to the employee and also notice to the employee of such danger. *Sedgwick v. Illinois Cent. R. Co.*, 73-158.

SIGNALS AT HIGHWAY CROSSINGS.

2003. Bell and whistle. 20 G. A., ch. 103, § 1. A bell and a steam whistle shall be placed on each locomotive engine operated on any railway in this state, and said whistle shall be twice sharply sounded at least sixty rods before a highway crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed, *provided* that at street crossings within the limits of incorporated cities or towns the sounding of the whistle may be omitted, unless required by the council of any such city or town; and the company shall also be liable for all damages which shall be sustained by any person by reason of such neglect.

Where there is failure to ring the bell upon approaching a crossing and an injury results, such failure will be negligence for which defendant will be liable unless exonerated by some negligence of plaintiff. *Reed v. Chicago, St. P., M. & O. R. Co.*, 74–188.

2004. Penalty. 20 G. A., ch. 114, § 2. Every officer or employe of any railway company who shall violate any of the provisions of this act shall be punished by fine, not exceeding one hundred dollars, for each offense.

STOPPING AT RAILWAY INTERSECTIONS.

2005. Full stop required; penalty. 20 G. A , ch. 163, § 1. All trains run upon any railroad in this state which intersects or crosses, or is intersected or crossed by any other railroad upon the same level, shall be brought to a full stop, at a distance not less than two hundred feet, nor more than eight hundred feet from the pont of intersection or crossing of such road, before such intersection or crossing is passed by any such train.

2006. Penalty. 20 G. A., ch. 163, § 2. Every engineer violating the provisions of the preceding section shall for each offense forfeit one hundred dollars to be recovered in an action in the name of the state of Iowa, for the benefit of the school fund, and the corporation on whose road such offense is committed shall forfeit for each offense so committed the sum of two hundred dollars, to be recovered in like manner.

LIABILITY AS CARRIER.

2007. Contract or regulation limiting. 1308. No contract, receipt, rule, or regulation, shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation, been made or entered into. [11 G. A., ch. 113.]

A contract such as is prohibited by this section is void whether it is with or without consideration. *Brush v. Sabula, A. & D. R. Co.*, 43–554.

Whether this section would be applicable to a contract made in Iowa but to be wholly performed in another state, *quære*; but it was held applicable to a contract to transport cattle from Clinton, Iowa, to Chicago, on the ground that it was to be partly performed in Iowa. *McDaniel v. Chicago & N. W. R. Co.*, 24–412

A company is not prohibited from providing by contract that it shall not be liable beyond the terminus of its road. *Mulligan v. Illinois Cent. R. Co.*, 36–181, 187.

The common law liability of a common carrier attaches to a carrier of live stock, so far as the rule is not inapplicable by reason of the peculiar

character of the property. Responsibility for the carriage of stock cannot, therefore be restricted by contract. *McCoy v. Keokuk & D. M. R. Co.*, 44-424.

A rule or custom limiting liability for injury to all stock, including such as is of especial value as being blooded, to the value of common stock is void. *McCune v. Burlington, C. R. & N. R. Co.*, 52-600.

This section does not render the carrier liable for loss occuring by the act of the owner. *Hart v. Chicago & N. W. R. Co.*, 69-485.

Whether a carrier, in the absence of any statute restricting his powers, can, by rule, regulation or contract, limit the amount for which he will be liable in case of loss of the property, *quære*. But the statutory provision prohibits the making of such contract. *Ibid.*

This statutory provision is applicable to contract for transportation from a point within to a point without the state; and is not unconstitutional in that respect. *Ibid.*

JUDGMENT LIENS.

2008. For injuries to person or property. 1309. A judgment against any railway corporation for any injury to any person or property, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the fourth day of July, A. D. 1862. [9 G. A., ch. 169, § 9.]

Where action is brought for recovery from the company damages for breach of contract under which the right of way was conveyed to it, the judgment may be made a lien on the portion of the line conveyed. *Varner v. St. Louis & C. R. R. Co.*, 55-677.

A judgment for damages for breach of contract by a railway company for failure to fence its right of way and construct cattle guards becomes a lien on the property of the company, but the party is not entitled to such lien for damages caused by negligent construction of the road causing an overflow of his land, nor for trespass in going upon his land outside the right of way. *Hull v. Chicago, B. & P. R. Co.*, 65-713.

A right of action, or an action pending for such injury, is not a lien, and the purchaser of the road before the rendition of judgment takes it free from the lien of such judgment when rendered. *Burlington, C. R. & N. R. Co. v. Verry*, 48-458; *White v. Keokuk & D. M. R. Co.*, 52-97.

This section is not unconstitutional. *Central Trust Co. v. Sloan*, 65-655.

This section means that a judgment rendered for the damages caused by an injury to the person shall be a superior lien, and in this sense damages may include the costs incurred in the inforcement of the claim. The portion of the judgment relating to costs is within the protection of the statute in the same way as the portion relating to the damages for the injury. *Central Trust Co. v. Central Iowa R. Co.*, 38 Fed. Rep., 889.

TRANSFERS AT COUNCIL BLUFFS.

2009. Within the State. 1310. All railway corporations that have been, or may hereafter be organized, under the laws of this state, that operate or may hereafter operate, a line of railway in this state, terminating at or near the city of Council Bluffs, and making a connection with any railway, which, either by its charter or otherwise, extends to a point on the boundary or within the limits of this state, be and they are hereby prohibited from making any transfer of freights, passengers, or express matters to or with any other railway corporation at or near such terminus—either by delivering or receiving the same—at any other place than in this state, at or near the said point at which the said railway extending to the boundary of this state terminates. [14 G. A., ch. 6, § 1.]

This and following sections relating to the same subject are void as being a regulation of commerce between the states and therefore in conflict with U. S. Const, art. 1, § 8, and acts of congress, U. S. Rev. Stat., §§ 5257, 5258; *Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45-338.

2010. Transfers. 1311. Every railway corporation, which, by its charter or otherwise, has its terminus at any point on the boundary or within the limits of this state, or which has authority to bridge or ferry the Missouri river for the purpose of having a continuous line of its railway, and for connecting with other railways in this state, is hereby prohibited from making any transfer of freights, passengers, or express matters to or with any other railway corporation, either by delivering or receiving the same at any other place than in this state, at or near its legal terminus; and every such corporation extending to the boundary or within this state, or having authority to bridge or ferry said Missouri river, shall erect and maintain at or near its legal terminus within the limits of this state, all its depots, stations, and other buildings necessary for such transfer. [Same, § 2.]

2011. Contracts with municipal corporations. 1312. Every railway corporation which has heretofore made, or which shall hereafter make, any contract with any municipal corporation in this state, is hereby prohibited from, in any manner, violating any of the provisions of such contract; and every railway corporation which has heretofore made, or which shall hereafter make, any contract with any municipal corporation in this state, is hereby required to perform each and all of the provisions of any and every such contract, specifically as agreed therein. In every case in which any such municipal corporation has complied with its obligations relating to such contract at any stage of the progress of its fulfillment, so far as it has agreed to do, such municipal corporation shall not be required to furnish any further tender or guaranty of compliance on its part in order to secure its rights in the courts; but in case anything remains to be done by such municipal corporation under such contract, after the completion of the same on the part of the railway corporation contracting therewith, then it shall, after the enforced compliance on the part of such corporation as hereinafter provided, be required to fully comply on its part. [Same, § 3.]

2012. Penalty. 1313. In case of a refusal of any railway corporation to comply with the provisions of section thirteen hundred and ten of this chapter [§ 2009], or its failure to perform the duties required in the preceding section, or their doing or having done any act at variance with such performance or duties, then the municipal corporation affected thereby, or with which the contract in that particular case was made, may, in an action by mandamus, in any court of record in the county in which such municipal corporation is situate, proceed against such corporation so failing or refusing, and such corporation shall, on proper proof, be required by such court to perform all the duties required by this said and the three preceding sections, and said law pertaining to mandamus shall apply in such a case with the same force that it does in all other cases, except as it is herein enlarged. [Same, § 4.]

[In the Code the word "provided" is erroneously inserted between "action" and "by" in the sixth line.]

2013. Proceedings to enforce. 1314. In case any municipal corporation affected as before stated, or with which any such contract has been made,

should not desire to seek the remedy given in the last preceding section, it may proceed in equity by the action of specific performance, in any court in the county in which such municipal corporation is situate, and in case such court should find that a contract had been made, it shall, by decree, require such company so violating or offering to violate its contract, or failing or refusing to perform the provisions thereof, to specifically perform the same. [Same, § 5.]

2014. Injunction. 1315. Any court or judge in this state to whom application shall be made, shall, at the suit of any municipal corporation as aforesaid, restrain by injunction the violation of any provisions of the five preceding sections of this chapter, or of the provisions of any contract as aforesaid; and in such proceeding, it shall not be necessary for such municipal corporation to give bond. [Same, § 6]

2015. Remedies not exclusive. 1316. The remedies provided for in the two preceding sections shall not be construed to be exclusive, and any order, judgment, or decree made by any court in pursuance of any provisions of the six preceding sections, shall be enforced in the usual manner. [Same, § 7.]

ASSESSMENT AND TAXATION.

2016. Executive Council to assess. 1317. On the first Monday of March in each year, the executive council shall assess all the property of each railway corporation in this state, excepting the lands, lots and other real estate belonging thereto not used in the operation of any railway. [14 G. A., ch. 26, § 1.]

This and the following sections relating to the taxation of railway property are not unconstitutional as providing for the taxation of the property of a corporation otherwise than that of individuals. *Dubuque v. Chicago, D. & M. R. Co.*, 47–196.

But a former statutory provision releasing railway companies from payment of municipal taxes previously levied, *held*, unconstitutional. *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633.

However questionable may be the constitutionality of provisions exempting railway companies from all other burdens by the payment of a definite sum annually, whether that sum be greater or less than its share of taxation, it is clear that such an exemption does not render void the general tax levied on other property. *Muscatine v. Mississippi & M. R. Co.*, I Dillion, 536.

The order of the board of supervisors declaring the length of the main track and the assessed value of the railroad lying within each city, town, township or lesser taxing district in the county, and transmitted to the city council or trustees of each city or incorporated town or township, becomes the basis for the levy of taxes upon the railroad property without such property being placed upon the assessment books of the township or city. *Sioux City & St. P. R. Co. v. Osceola County*, 45–168.

Although these sections relate to the assessment of the right of way, which is real property, and which, according to the general law as to assessments, would be assessed only once in two years, yet they are not unconstitutional, being applicable to all railway companies. *Central Iowa R. Co. v. Board of Supervisors*, 67–199.

As to taxation of property not used in operating the road, and of railway bridges over the Mississippi or Missouri rivers, see § 1281.

As to taxation of railway property under former statutes, see notes to § 1281.

2017. Statement furnished. 1318. The president, vice-president, or general superintendent, and such other officers as such council may desig-

nate of any corporation operating any railway in this state, shall furnish said council on or before the fifteenth day of February in each year, a statement signed and sworn to by one of such officers, showing a detail for the year ending on January the first preceding:

1. The whole number of miles owned, operated or leased in the state by such corporation making the return, and the value thereof per mile, with a detailed statement of all property of every kind, and the value, located in each county in the state.

2. Also a detailed statement of the number and value thereof of engines, passenger, mail, express, baggage, freight and other cars, or property used in operating or repairing such railway in this state; and on railways which are part of lines extending beyond the limits of this state, the return shall show the actual amount of rolling stock in use on the corporation's line in the state during the year for which return is made.

The return shall show the amount of rolling stock, the gross earnings of the entire railway, and the gross earnings of the same in this State, and all property designated in the next section, and such other facts as such council may, in writing, require. If such officers fail to make such statement, said council shall proceed to assess the property of the corporation so failing, adding thirty per cent to the assessable value thereof. [Same, §§ 2, 11; 12 G. A., ch. 196.]

2018. Assessment; valuation. 1319. The said property shall be valued at its true cash value, and such assessment shall be made upon the entire railway within the state, and shall include the right of way, road-bed, bridges, culverts, rolling-stock, depots, station grounds, shops, buildings, gravel beds, and all other property, real and personal, exclusively used in the operation of such railway. In assessing said railway and its equipments, said council shall take into consideration the gross earnings per mile for the year ending January the first, preceding, and any and all other matters necessary to enable said council to make a just and eqitable assessment of said railway property. If a part of any railway is without this state, then, in estimating the value of its rolling stock and movable property, they shall take into consideration the proportion which the business of that part of the railway lying within the state bears to the business of the railway without the state; such valuation shall be in the same ratio as that of the property of individuals. [14 G. A., ch. 26, § 3.]

The provisions of this section are applicable to railway bridges in general, but those of § 1281 apply to those therein mentioned. *Missouri Valley & B. R. & B. Co. v. Harrison County*, 74–283.

2019. Statement sent county auditor. 1320; 16 G. A., ch. 153. On or before the twenty-fifth day of March in each year, said council shall transmit to the county auditor of each county through which any railway may run, a statement showing the length of the main track of such railway within the county, and the assessed value per mile of the same as fixed by a pro rata distribution per mile of the assessed value of the whole property named in the preceding section. Said statement shall be entered on the proper record of the county. [Same, § 4.]

2020. Levy and collection. 1321. At the first meeting of the board of supervisors held after said statement is received by the county auditor, they shall make and cause the same to be entered in the proper record, an order,

stating and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township, or lesser taxing district in their county through which said railway runs, as fixed by the executive council, which shall constitute the taxable value of said property for taxable purposes, and the taxes on said property when collected by the county treasurer shall be paid over to the persons or corporations entitled thereto as other taxes, and the county auditor shall transmit a copy of said order to the city council or trustees of such city, incorporated town, or township. [Same, § 5.]

The order of the board becomes the basis for the levy of taxes on railway property for all purposes, and the assessment need not be placed upon the assessor's books. *Sioux City & St. P. R. Co. v. Osceola County*, 45–168, 177.

The valuation upon which a railway company is to be taxed within any corporation or taxing district is to be determined from the number of miles of main track within the corporation or district, as determined by the order of the board of supervisors, and the value per mile as fixed by the executive council. The order of the board determining the number of the miles of track is not, in any sense, an assessment of valuation, and the provision of statute exempting agricultural and horticultural lands lying within the limits of incorporated towns and cities from taxation for city purposes have no application to railway property. The taxes due from the railroad company for such purposes cannot be reduced by reason of the fact that the track runs for a portion of the way within the city limits through land that is not platted or laid out into lots. *Illinois Cent. R. Co. v. Hamilton County*, 73–313.

2021. Rate of taxation. 1322. All such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships, and lesser taxing districts. [Same, § 6.]

See § 1286.

LIMITATION OF PROVISIONS AS TO FARE.

2022. Dependent upon gross earnings. 1323. The provisions of this chapter in relation to transporting of passengers, shall not apply to any railway in this state until the gross earnings of the preceding year, reckoning from the first day of January of each year, shall equal or exceed the sum of four thousand dollars per mile average for all the miles of road operated during the whole of that preceding year.

This section apparently relates to § 2000.

TAXATION OF SLEEPING AND DINING CARS.

2023. Number reported. 17 G. A., ch. 114, § 1. In addition to the matters required to be contained in the statement provided for in section thirteen hundred and eighteen of the code [§ 2017], such statement shall show the number of sleeping and dining cars not owned by such corporation, but used by it in operating its railway in this state during each month of the year for which the return is made, and also the number of miles each month that said cars have been run or operated on such railway within the state, and the total number of miles that said cars have been run or operated each month within and without the state.

2024. Assessment by executive council. 17 G. A., ch. 114, § 2. The executive council shall, at the time of the assessment of other railway prop-

erty for taxation, assess for taxation the average number of cars so used by such corporation each month, and the assessed value of said cars shall bear the same proportion to the entire value thereof, that the monthly average number of miles that such cars have been run or operated within the state shall bear to the monthly average number of miles that such cars have been used or operated within and without the state, such valuation shall be in the same ratio as that of the property of individuals.

2025. Manner. 17 G. A., ch. 114, § 3. The executive council shall, as provided by sections thirteen hundred and eighteen and thirteen hundred and nineteen of the code [§§ 2017, 2018], first assess the value of the property of the corporation using sleeping and dining cars not owned by such corporation, and shall then add to such valuation, the amount of the assessed valuation of said sleeping and dining cars, made as hereinbefore provided, and such aggregate amount shall constitute and be considered the assessed value of the property of such corporation for the purposes of taxation.

These provisions *held* valid and constitutional, as subjecting such property only to the extent to which it receives protection, and not an interference with interstate commerce. *Pullman's Palace Car Co. v. Twombly*, 29 Fed. Rep., 658.

RATES OF FARE AND FREIGHT.

2026. Classification of railroads. 15 G. A., ch. 68, § 1. All railroad corporations organized or doing business in this state, their trustees, receivers, or lessees, under the laws or authority thereof, shall be limited in their maximun charges to the rates of compensation for the transportation of passengers and freight, which are herein prescribed. All railroads in this state shall be classified according to the gross amount of their respective annual earnings within the state, per mile, for the preceding year, as follows: Class "A" shall include all railroads whose gross annual earnings, per mile, shall be four thousand dollars or more. Class "B" shall include all railroads whose gross annual earnings, per mile, shall be three thousand dollars or any sum in excess thereof less than four thousand dollars. Class "C" shall include all railroads whose gross annual earnings, per mile, shall be less than three thousand dollars.

The state cannot by statute regulate rates of transportation under one entire contract from a point within to a point without the state. Such regulation would be an interference with the power of the federal government to regulate interstate commerce. *Carton v. Illinois Cent. R. Co.*, 59–148; *Keiser v. Illinois Cent. R. Co.*, 5 McCrary, 496.

Where the railway obligates itself to carry to another point within the state and deliver to a connecting carrier, its contract is not one for transportation to a point beyond the state. *Heiserman v. Burlington, C. R. & N. R. Co.*, 63–732.

The regulation by a board of railroad commissioners that rates of transportation from a point without to a point within the state shall conform to like distances within the state is unconstitutional and interferes with interstate commerce. *State v. Chicago & N. W. R. Co.*, 70–162.

Where a contract for transportation by a carrier provided for transportation of the goods from one point within the state to another point also within the state, and the rates of transportation were in excess of those fixed by statute, *held*, that the excess of charges paid might be recovered back, although it was shown that the intention was that the property should be delivered by the carrier receiving it to a connecting carrier and continuously transported to a point without the state, and although the charge for the en-

tire transportation would have been a reasonable one. *Heiserman v. Burlington, C. R. & N. R. Co.*, 63-732

Where the statute defines the charges which can lawfully be made by a railway company, charges in excess of those prescribed are unlawful and may be recovered back in an action for excess. The amount fixed by statute will be conclusively presumed to be the limit of reasonable compensation. *Ibid.*

The enactment of a statute imposing penalties for excessive charges recoverable by the party injured, and providing a punishment against the agent of a carrier for exacting and collecting excessive charges, does not take away the right existing at common law to recover money paid in excess of a reasonable charge. *Ibid.*

In such case an action will not be barred in two years under the provision relating to suits to recover a statute penalty, but will stand on the same footing as any action on implied contract. *Ibid.*

In an action to recover excessive charges paid, the plaintiff need not show objection or protest prior to or at the time of making payment which is in excess of a reasonable compensation. *Ibid.*

Under a statute imposing upon any railway company charging excessive rates a forfeiture to be recovered by the person injured, and providing that any agent or officer of such corporation violating or being a party to the violation of any of the provisions of the act should be guilty of a misdemeanor and punished accordingly, *held*, that where an agent was himself a shipper and accounted and turned over to the company charges for shipments made by him at illegal rates, he and the company were *in pari delicto* as to such harges, and that he could not recover the same in an action against the company. *Steever v. Illinois Cent. R. Co.*, 62-371.

This statutory provision *held* not an impairment of the charter of a railroad granted before its enactment, for the reason that as the charter of the company did not establish the maximum charges, it was competent for the legislature to do so afterwards. Nor is such legislation unconstitutional by reason of not being of uniform operation. *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S., 155.

2027. Maximum fare. 15 G. A., ch. 68, § 2. All railroad corporations, according to their classifications as herein prescribed, shall be limited to compensation per mile for the transportation of any person, with ordinary baggage not exceeding one hundred pounds in weight as follows: Class "A" three cents; class "B" three and one-half cents; class "C" four cents; *provided*, that no such corporation shall charge, demand, or receive any greater compensation per mile for the transportation of children twelve years of age or under, than half the rate above prescribed; *and provided, also*, a charge of ten cents may be added to the fare of any passenger, when the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train.

The regulation that a passenger shall pay full rate upon failure to procure and present a ticket which he might have purchased from the agent at a reduced rate is not unreasonable. *State v. Chovin*, 7-204.

The carrier may make a regulation requiring passengers to procure a ticket before taking passage in a caboose car attached to a freight train, and may eject from the car in a proper place and manner, any person failing to comply with such regulation. *Law v. Illinois Cent. R. Co.*, 32-534.

A railway company is allowed to collect an additional sum over the regular rate of fare from passengers who fail to purchase tickets, and the reasonableness of such regulation is not a question for the jury. *Hoffbauer v. Davenport & N. W. R. Co.*, 52-342.

In an action to recover for being ejected from a train for want of a ticket, where the plaintiff claimed that he was not able to procure such ticket on account of the failure of the company to have its ticket office open before the starting of the train, *held*, that it was proper to allow defendant to introduce

evidence of the character of the station and whether the facilities extended to the traveling public to purchase tickets were such as required for the convenience of the public. While it is required that the office should be open for business a sufficient time before the departure of the train, in order to enable passengers to procure their tickets, receive and count their change, if any, and prepare to board the train, without unnecessary interference with each other, yet it is not required that the office shall remain open up to the instant the train moves off. Unfitness of the station cannot be relied on as an excuse for not procuring a ticket, that reason not having been alleged to the conductor. *Everett v. Chicago, R. I. & P. R. Co.*, 69-15.

The failure of the company to sell a ticket to a passenger before entering the cars cannot be made a ground for recovery of damages where the passenger afterward tenders with his fare to the conductor the extra amount required on account of not having a ticket. *Curl v. Chicago, R. I. & P. R. Co.*, 63-417.

2028. Annual statement. 15 G. A., ch., 68, § 7. It shall be the duty of each railroad corporation operating a railroad in this state during the month of January, 1875, and each and every year thereafter, to make and return to the governor a statement of its gross receipts on its entire road within this state for the year preceding and ending with the thirty-first day of December. Said statement shall be sworn to by the president and superintendent of the road in this state, and shall contain a detailed statement of the entire receipts for transporting freight and passengers, and all other sources of income of the road. A failure to comply with the provisions of this section shall subject the corporation so failing, to a penalty of one hundred dollars per day, for each and every day after such report is due until it is made; to be recovered in an action in the name of the state of Iowa, for the benefit of the school fund. If the executive council shall, on examination, be satisfied of the correctness of said return, it shall be their duty to classify the different railroads in this state as hereinbefore provided; and the governor, when there shall be any change in classification, shall issue a certificate to any corporation or corporations affected by such change, certifying to them the class to which they are respectively assigned. And any change of rates made by any railroad corporation pursuant to any change of classification, shall take effect and be in force from and after the fourth day of July following such changes. The reports from the railroad corporations of this state for the year 1873, made pursuant to the provisions of section twelve hundred and eighty of the code [§ 1962], shall determine the classification of each road for the year ending July 3, 1875.

BOARD OF RAILROAD COMMISSIONERS.

2028a. 22 G. A., ch. 29, § 1. Sections two and eight, of chapter seventy-seven, acts of the seventeenth general assembly, and all acts and parts of acts inconsistentent with this act, are hereby repealed.

2029. Election; organization. 17 G. A., ch. 77, § 2; 22 G. A., ch. 29, § 2. At the regular election in the year 1888, there shall be three persons having the qualification of electors, in the places where they shall respectively reside in the state of Iowa, chosen by the electors of the state, from the body of the electors of said state, who, when they shall have taken the oath of office and given such bond as may be required of them by the governor of the state, shall be known and styled the board of railroad commissioners of the state of Iowa. They shall hold office, beginning on the

second Monday in January, 1889, for the period of one, two, and three years respectively, as shall be decided between them by lot at their first meeting as a board in such manner as may be designated by the secretary of state. At the regular election in the year 1889, and every year thereafter at each such election there shall be chosen one person as commissioner, having the qualification hereinbefore and hereinafter described, who shall hold his office for three years from the second Monday in January after his election, and until his successor is elected and qualified. Said person shall fill the vacancy caused by the expiration of the term of the commissioner whose term expires on the second Monday in January following his said election. It shall organize on each second Monday in every year immediately after the new member has been qualified and if for any cause this is not done, it may be done at a subsequent meeting. The organization shall be by the selection of one member as chairman and a person having the qualifications hereinbefore and hereinafter described for a commissioner as secretary. The board shall have power to employ such additional clerical help as it may deem necessary and for the good of the service. No person in the employ of any common carrier or owning any bonds, stock, or property, in any railroad company, or who is in any way or manner pecuniarily interested in any railroad corporation shall be eligible to the office of railroad commissioner and the entering into the employ of any common carrier, or the acquiring of any stock or other interest in any common carrier by any officer under this act after his election or appointment shall disqualify him to hold the office, and to perform the duties thereof.

2030. Vacancies filled. 22 G. A., ch. 29, § 3. All vacancies in the office of railroad commissioners shall be filled by appointment of the governor. The person appointed to serve until his successor is elected and qualified. The board of commissioners as constituted by chapter seventy-seven, acts seventeenth general assembly [§§ 2033-2046], shall hold office and have all powers conferred upon them by chapter seventy-seven, acts of the seventeenth general assembly and acts amendatory thereto and such other powers and authority as are now or may hereafter be conferred upon them by law until commissioners shall be chosen and enter upon their duties as contemplated by this act.

2031. Canvass of votes for. 22 G. A., ch. 29, § 4. The canvass of votes cast for election of commissioners provided for in this act shall be made and returns and abstracts thereof and relating thereto be made, certified and forwarded and results of said election declared (by the executive council) in all respects in the same manner and by the same officers and boards as now provided by law for canvassing, making, certifying, forwarding and declaring the same as to other state officers.

2032. Powers. 22 G. A., ch. 29, § 5. The commissioners chosen under this act shall have all the powers that are conferred upon the railway commission by chapter seventy-seven, acts of the seventeenth general assembly [§§ 2033-2046], and such other powers and authority as may be now or shall hereafter be imposed by law.

2033. Duties. 17 G. A., ch. 77, § 3. Said commissioners shall have the general supervision of all railroads in the state operated by steam, and shall inquire into any neglect or violation of the laws of this state by any railroad corporation doing business therein, or by the officers, agents or employees,

thereof, and shall also from time to time carefully examine and inspect the condition of each railroad in the state, and of its equipment, and the manner of its conduct and management, with reference to the public safety and convenience, and for the purpose of keeping the several railroad companies advised as to the safety of their bridges, shall make a semi-annual examination of the same, and report their condition to the said companies. And if any bridge shall be deemed unsafe by the commissioners, they shall notify the railroad company immediately, and it shall be the duty of said railroad company to repair and put in good order within ten days after receiving said notice, said bridge, and in default thereof, said commissioners are hereby authorized and empowered to stop and prevent said railroad company from running or passing its trains over said bridge, while in its unsafe condition. Whenever, in the judgment of the railroad commissioners, it shall appear that any railroad corporation fails, in any respect or particular, to comply with the terms of its charter or the laws of the state, or whenever in their judgment any repairs are necessary upon its road, or any addition to its rolling stock, or any addition to or change of its stations or station houses, or any change in its rates of fare for transporting freight or passengers, or any change in the mode of operating its road and conducting its business is reasonable and expedient in order to promote the security. convenience and accommodation of the public, said railroad commisssioners shall inform such railroad corporation of the improvements and changes which they adjudge to be proper, by a notice thereof in writing to be served by leaving a copy thereof certified by the commissioners' clerk, with any station agent, clerk, treasurer or any director of said corporation and a report of the proceedings shall be included in the annual report of the commissioners to the legislature. Nothing in this section shall be construed as relieving any railroad company from their present responsibility or liability for damage to person or property.

2034. Report. 17 G. A., ch. 77, § 4. The said railroad commissioners shall, on or before the first Monday in December in each year, make a report to the governor of their doings for the preceding year, containing such facts, statements and explanations as will disclose the working of the system of railroad transportation in this state, and its relation to the general business and prosperity of the citizens of the state, and such suggestions and recommendations in respect thereto as may to them seem appropriate. Said report shall also contain as to every railroad corporation doing business in this State :

First.—The amount of its capital stock.

Second.—The amount of its preferred stock, if any, and the condition of its preferment.

Third.—The amount of its funded debt and the rate of interest.

Fourth.—The amount of its floating debt.

Fifth.—The cost and actual present cash value of its road and equipment, including permanent way, buildings and rolling stock, all real estate used exclusively in operating the road and all fixtures and conveniences for transacting its business.

Sixth.—The estimated value of all other property owned by such corporation, with a schedule of the same, not including lands granted in aid of its construction.

Seventh.—The number of acres originally granted in aid of construction of its road by the United States or by this state.

Eighth.—Number of acres of such land remaining unsold.

Ninth.—A list of its officers and directors, with their respective places of residence.

Tenth.—Such statistics of the road and of its transportation business for the year as may, in the judgment of the commissioners, be necessary and proper for the information of the general assembly, or as may be required by the governor. Such report shall exhibit and refer to the condition of such corporation on the first day of July of each year, and the details of its transportation business transacted during the year ending June thirtieth.

Eleventh.—The average amount of tonnage that can be carried over each road in the state with an engine of given power.

2035. Reports of railroad companies. 17 G. A., ch. 77, § 5. To enable said commissioners to make such a report, the president or managing officer of each railroad corporation doing business in this state, shall annually make to the said commissioners, on the fifteenth day of the month of September, such returns, in the form which they may prescribe, as will afford the information required for their said official report; such returns shall be verified by the oath of the officer making them; and any railroad corporation whose return shall not be made as herein prescribed by the fifteenth day of September, shall be liable to a penalty of one hundred dollars for each and every day after the sixteenth day of September that such return shall be wilfully delayed or refused.

2036. Salaries. 17 G. A., ch. 77, § 6. The said commissioners shall hold their office in the capitol, or at some other suitable place in the city of Des Moines. They shall each receive a salary of three thousand dollars per annum, to be paid as the salaries of other state officers are paid, and shall be provided at the expense of the state with necessary office furniture and stationery, and they shall have authority to appoint a secretary, who shall receive a salary of fifteen hundred dollars per annum.

2037. Oath; bond. 17 G. A., ch. 77, § 7. Said commissioners and secretary shall be sworn to the due and faithful performance of the duties of their respective offices before entering upon the discharge of the same, as prescribed in section six hundred and seventy-six of the code [§ 1141], and no person in the employ of any railroad corporation, or holding stock in any railroad corporation, shall be employed as secretary. Each of said commissioners shall enter into bonds with security to be approved by the executive council, in the sum of ten thousand dollars, conditioned for the faithful performance of his duties.

2038. Examination of books of officers. 17 G. A., ch. 77, § 6. The said commissioners shall have power, in the discharge of the duties of their office, to examine any of the books, papers or documents of any such corporation, or to examine under oath or otherwise any officer, director, agent or employee of any such corporation; they are empowered to issue subpœnas and administer oaths in the same manner and with the same power to enforce obedience thereto in the performance of their said duties as belong and pertain to courts of law in this state; and any person who may wilfully obstruct said commissioners in the performance of their duties, or who may refuse to give any information within his possession that may be required by

said commissioners within the line of their duty, shall be deemed guilty of a misdemeanor, and shall be liable, on conviction thereof, to a fine not exceeding one thousand dollars, in the discretion of the court, the costs of such subpœnas and investigation to be first paid by the state on the certificate of said commissioners.

2039. Duty of railroad to furnish and transport cars. 17 G. A., ch. 77, § 10. It shall be the duty of any railroad corporation, when within their power to do so, and upon reasonable notice, to furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight, and to receive and transport such freight with all reasonable dispatch, and to provide and keep suitable facilities for the receiving and handling the same at any depot on the line of its road; and also to receive and transport in like manner, the empty or loaded cars, furnished by any connecting road, to be delivered at any station or stations on the line of its road, to be loaded or discharged, ot reloaded and returned to the road so connecting; and for compensation it shall not demand or receive any greater sum than is accepted by it from any other connecting railroad, for a similar service.

The duty of one railway to transport the cars of another road may be enforced by mandatory injunction, and the fact that the receiving of such cars by the former road will cause a strike of its employees will constitute no defence. *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.*, 34 Fed. Rep., 481.

2040. Reasonable rates. 17 G. A., ch. 77, § 12. No railroad company shall charge, demand or receive from any person, company or corporation an unreasonable price for the transportation of persons or property, or for the handling or storing of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad corporation.

In an action, not brought under this statute, to recover excessive charges, *held*, that concealment by defendant of facts showing the charges to be excessive was sufficient to prevent the statute of limitations running against the action. *Carrier v. Chicago, R. I. & P. R. Co.*, 79–80; *Cook v. Chicago, R. I. & P. R. Co.*, 46 N. W. Rep., 1080.

At common law a carrier has no right to make unjust discrimination between customers, and where it appeared that defendant had regularly given rebates to other customers, which it had denied to plaintiff under similar circumstances and the giving of which it had concealed from him, *held* that he could recover the amount of such excessive charges. Also, *held*, that the payment by the shipper in such case was not voluntary so as to preclude recovery. *Cook v. Chicago, R. I. & P. R. Co.*, 46 N. W. Rep., 1080.

2041. Penalty. 17 G. A., ch. 77, § 13. Any railroad corporation which shall violate any of the provisions of this act, as to extortion or unjust discrimination, shall forfeit for every such offense to the person, company, or corporation aggrieved thereby, three times the actual damages sustained or overcharges paid by the said party aggrieved, together with the cost of suit, and a reasonable attorney's fee to be fixed by the court, and if an appeal be taken from the judgment or any part thereof, it shall be the duty of the appellate court to include in the judgment an additional reasonable attorney's fee for services in the appellate court or courts, to be recovered in a civil

action therefor. And in all cases where complaint shall be made, in accordance with the provisions of section fifteen [§ 2043], hereinafter provided, that an unreasonable charge is made, the commissioners shall require a modified charge for the service rendered, such as they shall deem to be reasonable, and all cases of a failure to comply with the recommendation of the commissioners shall be embodied in the report of the commissioners to the legislature; and the same shall apply to any unjust discrimination, extortion, or overcharge by said company, or other violation of law.

This section is not applicable to interstate commerce. *Cook v. Chicago R. I. & P. R. Co.*, 75–169.

In an action brought to recover excessive charges for interstate transportation, *held* that plaintiff might, by amendment abandon the claim therefor under this section and ask the relief to which he would be entitled at common law. *Ibid.*

The extortion or unjust discrimination contemplated in this section is such as arises from extortionate or discriminating charges and not such as arises from failure or refusal to furnish transportation, or to furnish cars, nor does § 2039 make any provisions against discriminating in furnishing cars or transportation of property. It simply imposes duties which the common law lays upon all carriers with others relating to the furnishing of cars and the transportation of cars delivered to the railroad by a connecting road. The penalty in treble damages provided in this section is therefore not applicable to such discrimination. *Bond v. Wabash, St. L. & P. R. Co.*, 67–712.

This statute, so far as it imposes a forfeiture for doing acts therein prohibited, is to be regarded as penal and cannot be extended by implication. *Ibid.*

2042. Investigation of accidents. 17 G. A., ch. 77, § 14. Upon the occurrence of any serious accident upon a railroad which shall result in personal injury, or loss of life, the corporation operating the road upon which the accident occurred shall give immediate notice thereof to the commissioners whose duty it shall be, if they deem it necessary, to investigate the same, and promptly report to the governor the extent of the personal injuries, or loss of life, and whether the same was the result of the mismanagement or neglect of the corporation on whose line the injury or loss of life occurred. *Provided,* that such report shall not be evidence or referred to in any case in any court.

2043. Examination of rates. 17 G. A., ch. 77, § 15. It shall be the duty of said commissioners upon the complaint and application of the mayor and aldermen of any city or the mayor and council of any incorporated town, or the trustees of any township, to make an examination of the rate of passenger fare or freight tariff charged by any railroad company, and of the condition or operation of any railroad, any part of whose location lies within the limits of such city, town or township, and if twenty-five or more legal voters in any city or township shall, by petition in writing, request the mayor and aldermen of such city or the trustees of such township, to make the said complaint and application, and the mayor and aldermen, or the trustees, refuse or decline to comply with the prayer of the petition, they shall state the reason for such non-compliance in writing upon the petition, and return the same to the petitioners; and the petitioners may thereupon, within ten days from the date of such refusal and return,

present such petition to said commissioners and said commissioners, shall, if upon due inquiry and hearing of the petitioners, they think the public good demands the examination, proceed to make it in the same manner as if called upon by the mayor and aldermen of any city, or the trustees of any township. Before proceeding to make such examination, in accordance with such application or petition, said commissioners shall give to the petitioners and the corporation reasonable notice, in writing, of the time and place of entering upon the same. If, upon such an examination, it shall appear to said commissioners that the complaint alleged by the applicants or petitioners is well founded, they shall so adjudge, and shall inform the corporation operating such railroad of their adjudication within ten days, and shall also report their doings to the governor, as provided in the fourth section of this act [§ 2034].

2044. To whom applicable. 17 G. A., ch. 77, § 16. In the construction of this act, the phrase railroad shall be construed to include all railroads and railways operated by steam, and whether operated by the corporation owning them or by other corporations or otherwise. The phrase railroad corporation shall be construed to mean the corporation which constructs, maintains or operates a railroad operated by steam power.

2045. Cumulative. 17 G. A., ch. 77, § 17. Nothing in this act shall be construed to estop or hinder any persons or corporations from bringing suit against any railroad company for any violation of any of the laws of this state for the government of railroads.

2046. 17 G. A., ch. 77, § 18. All acts or parts of acts inconsistent with this act are hereby repealed.

2047. Decrees of commissioners enforced. 20 G. A., ch. 133, § 1. The [circuit and] district courts of this state shall have jurisdiction to enforce, by proper decrees, injunctions and orders, the rulings, orders and regulations affecting public right, made or to be made by the board of railroad commissioners, such as are now, or may hereafter be, authorized to be made by them for the future direction and observance of railroads in this state. The proceedings therefor shall be by equitable action in the name of the state of Iowa, and shall be instituted by the attorney-general, whenever advised by the board of railroad commissioners that any railway corporation, or person operating a line of road in this state, is violating and refusing to comply with any rule, order or regulation made by such board of railroad commissioners, and applicable to such railroad or person. It shall be the duty of the court in which any such cause shall be pending to require the issues to be made up at the first term of the court to which such cause is brought, which shall be the trial term, and to give the same precedence over other civil business. If the court shall find that such rule, regulation, or order is reasonable and just, and that in refusing compliance therewith said railway company is failing and omitting the performance of any public duty or obligation, the court shall decree a mandatory and perpetual injunction compelling obedience to and compliance with such rule, order, or regulation by said railroad company, or other person, its officers, agents, servants and employees and may grant such other relief as may be deemed just and proper. All violations of such decree shall render the company, persons, officers, agents, servants and employees who are in any manner instrumental in such violations, guilty of contempt of court, and the court may punish

such contempt by fine not exceeding one thousand dollars for each offense, and may imprison the person guilty of contempt until he shall sufficiently purge himself therefrom. And such decree shall continue and remain in effect and be enforced until the rule, order or regulation shall be modified or vacated by the board of railroad commissioners.

See *State v. Central Iowa R. Co.*, 71–410.

The provisions of this section are in no ways in conflict with the provisions of the interstate commerce act passed by congress with reference to interchange of traffic. *State of Iowa v. Chicago, M. & St. P. R. Co.*, 33 Fed. Rep., 391.

2048. Costs. 20 G. A., ch. 133, § 2. Whenever a decree shall be entered against a railroad company or person under section one [§ 2047], the court shall render judgment for costs, including a reasonable attorney's fee for counsel representing the state in said case, and said judgment shall be enforced by execution.

REGULATION OF RAILROADS AND OTHER CARRIERS.

2049. To what applicable. 22 G. A., ch. 28, § 1. The provisions of this act shall apply to the transportation of passengers and property, and to receiving, delivering, storage and handling of property wholly within this state and shall apply to all railroad corporations and railway companies, express companies, car companies, sleeping-car companies, freight or freight-line companies and to any common carrier or carriers engaged in this state in the transportation of passengers or property by railroad therein, and shall also be held to apply to shipments of property made from any point within the state to any point within the state, whether the transportation of the same shall be wholly within this state or partly within this and an adjoining state or states. The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad and also all the road in use by any corporation, receiver, trustee or other person operating a railroad whether owned or operated under contract, agreement, lease or otherwise, and the term "transportation" shall include all instrumentalities of shipment or carriage, and the term "railroad corporation" contained in this act shall be deemed and taken to mean all corporations, companies or individuals now owning or operating, or which may hereafter own or operate any railroad in whole or in part in this state; and the provisions of this act shall apply to all persons, firms and companies and to all associations of persons whether incorporated or otherwise that shall do business as common carriers upon any of the lines of railway in this state (street railways excepted) the same as to railroad corporations herein mentioned.

2050. Charges to be reasonable. 22 G. A., ch. 28, § 2. All charges made for any service rendered or to be rendered in the transportation of passengers or property in this state, as aforesaid or in connection therewith or for the receiving, delivering, storage or handling of such property shall be reasonable and just; and every unjust and unreasonale charge for such service is prohibited and declared to be unlawful.

2051. Unjust discrimination. 22 G. A., ch. 28, § 3. If any common carrier subject to the provisions of this act shall directly or indirectly, by

any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful; this section, however, is not to be construed as prohibiting a less rate per one hundred pounds in a carload lot than is charged, collected or received for the same kind of freight in less than a carload lot.

As to construction of provisions against unjust discriminations in a former statute, see *Paxton v. Illinois Cent. R. Co.*, 56-427.

2052. No preference or advantage; interchange. 22 G. A., ch. 28, § 4. It shall be unlawful for any common carrier, subject to the provisions of this act to make or give any preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation or locality or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever; *provided*, however, that nothing herein shall be construed to prevent any common carrier from giving preference as to time of shipment of live-stock, uncured meats or other perishable property. All common carriers subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and switching of cars, and the receiving, forwarding and delivering of passengers and property to and from their several lines, and to and from other lines and places connected therewith; and shall not discriminate in their accommodations, rates and charges between such connecting lines. And any common carrier may be required to switch and transfer cars for another for the purpose of being loaded or unloaded, upon such terms and conditions as may be prescribed by the board of railroad commissioners.

2053. Long and short haul. 22 G. A., ch. 28, § 5. It shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of a like kind of property for a shorter than for a longer distance over its railroad, all or any portion of the shorter haul being included within the longer. And said common carrier shall charge no more for transporting freight to or from any point on its railroad than a fair and just rate as compared with the price it charges for the same kind of freight transportation to or from any other point.

2054. Freight pooling. 22 G. A., ch. 28, § 6. It shall be unlawful for any common carrier, subject to the provisions of this act to enter into any contract, agreement or combination with any other common carrier or carriers for the pooling of freight of different and competing railroads, or divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the

pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

2055. Schedules of rates and fares. 22 G. A., ch. 28, § 7. Every common carrier subject to the provisions of this act, shall print and keep for public inspection, schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established, and which are in force at the time upon its railroad as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroads between which property and passengers will be carried and shall contain the classification of freight in force upon such railroad, and shall also state separately any terminal charges and any rules or regulations which in any wise change, affect or determine any part of the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type of a least the size of ordinary pica, and a copy for the use of the public shall be kept in every freight office and passenger station, on such railroad, where it can be conveniently inspected, and such common carrier shall keep a printed notice posted in every such freight office and passenger station indicating where therein such schedules can be found. No advance shall be made in the rates, fares and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedules then in force and the time when the increased rates, fares or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reduction in such published rates, fares or charges may be made without previous public notice, but whenever any such reduction is made, notice of the same shall immediately be publicly posted, and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection. And when any such common carrier shall have established and published its rates, fares and charges, in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith than is specified in such published schedule of rates, fares and charges as may at the time be in force. Every common carrier subject to the provisions of this act shall file with the board of railroad commissioners of this state, copies of its schedules of rates, fares and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said commissioners of all changes made in the same. Every such common carrier shall also file with said commissioners, copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes in this state operated by more than one common carrier and the several common carriers operating such lines or routes have established joint tariffs of rates or

fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said commissioners. Such joint rates, fares and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers, when directed by said commissioners, in so far as may in the judgment of the commissioners be deemed practicable; and said commissioners shall from time to time prescribe the measures of publicity which shall be given to such rates, fares and charges, or to such part of them as they may deem it practicable for such common carriers to publish and the places in which they shall be published; but no common carrier, party to any such joint tariff shall be liable for the failure of any other common carrier party thereto, to observe and adhere to the rates, fares or charges thus made and published. If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares and charges as provided in this section or any part of the same, such common carriers shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus to be issued by any district court of this state in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed. And if such common carrier be a foreign corporation, then such writ may be issued by any district court, in the judicial district where such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid porvisions of this section, and such writ shall issue in the name of the state of Iowa at the relation or upon the petition of the said board of railroad commissioners of this state; and failure to comply with its requirements shall be punishable as and for a contempt; and shall make said corporation liable to a penalty of five hundred dollars for each days' failure to comply and when any such writ of mandamus, shall be so applied for by said commissioners, no bond shall be required of them by any court or judge, in which or before whom any such application may be made.

2056. Continuous shipments. 22 G. A., ch. 28, § 8. It shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract or agreement, expressed or implied, to prevent by change of time schedules, carriage in different cars or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination in this state; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break stoppage or interruption was made in good faith for some necessary purpose and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

2057. Liability; treble damages. 22 G. A., ch. 28, § 9. In case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited, or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby, for three times the amount of damages sustained in consequence of any such violation of the provisions of this act, together with

costs of suit and a reasonable counsel or attorney's fee to be fixed by the court in which the same is heard on appeal or otherwise, which shall be taxed and collected as part of the costs in the case; *provided* that in all cases demand in writing on said common carrier shall be made for the money damages sustained before suit is brought for recovery under this section and that no suit shall be brought until the expiration of fifteen days after such demand.

2058. Remedy; evidence. 22 G. A., ch. 28, § 10. Any person or persons claiming to be damaged by any common carrier, subject to the provisions of this act, may either make complaint to the board of railroad commissioners of this state or may bring suit in his or their own behalf for the recovery of damages for which any such commom carrier may be liable under the provisions of this act in any court of this state of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies at the same time. In any such action brought for the recovery of damages, the court before whom the same shall be pending may compel any director, officer, receiver, trustee or agent of the corporation or company, defendant in such suit to attend, appear and testify in such case and may compel the production of the books and papers of such corporation or company party to any such suit; the claims that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person or witness from testifying or producing said books and papers; but such evidence or testimony shall not be used against such person in any way, on the trial of any criminal proceedings.

2059. Penalty against individuals. 22 G. A., ch. 28, § 11. Except as otherwise specially provided for in sections twenty-three to twenty-eight inclusive, of this act [§§ 2071–2076], and unless relieved from the consequences of a violation of the law as provided in section fifteen of this act [§ 2063], any common carrier subject to the provisions of this act, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for, or employed by such corporation, who, alone or with any other corporation, company, person or party shall wilfully do, or cause to be done, or shall willingly suffer or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter or thing in this act required to be done, or shall cause or willingly suffer, or permit any act, matter or thing so directed or required by this act to be done, not to be so done, or shall aid or abet any such omission, or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor and shall upon conviction thereof in any district court of this state of competent jurisdiction be subject to a fine of not to exceed five thousand dollars and not less than five hundred dollars for each offense.

2060. Inquiry by commissioners. 22 G. A., ch. 28, § 12. It shall be the duty of and the board of railroad commissioners of this state shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted and shall have the right to obtain from such common carriers full and complete information necessary to enable the said commissioners to perform the duties and carry

out the object for which said board was created and which are contemplated by this act; and for the purposes of this act the said commissioners shall have power to require the attendance and testimony of witnesses and the production of all books, papers, tariffs, schedules, contracts, agreements and documents relating to any matter under investigation, and to that end may invoke the aid of any court of this state in requiring the attendance and testimony of witnesses and the production of books, papers and documents under the provisions of this section. And any court of this state within the jurisdiction of which such inquiry is carried on, shall in case of contumacy, or refusal to obey a subpœna, or other proper process issued to any common carrier or person subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said commissioners (and produce books and papers if so ordered) and give evidence touching or in relation to the matter in question; and any failure to obey such order of the court shall be punished by such court as a contempt thereof; the claim that any such testimony or evidence may tend to criminate the person giving such evidence, shall not excuse such person or witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

2061. Complaint. 22 G. A., ch. 28, § 13. Any person, firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, complaining of anything done or omitted to be done, by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said commissioners by petition which shall briefly state the facts whereupon a statement of the complaint thus made with the damages if any are alleged shall be forwarded by the said commissioners to such common carrier who shall be called upon to satisfy the complaint, or to answer the same in writing within a reasonable time to be specified by the commissioners. If such common carrier within the time specified shall make reparation for the injury alleged to have been done or shall correct the wrong complained of, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such common carrier shall not satisfy the complaint, within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the said commissioners to investigate the matters complained of in such manner and by such means as said commissoners shall deem proper and said commissioners whenever they may have sufficient reason to believe that any common carrier is violating any of the provisions of this act shall at once institute an inquiry in the same manner, and to the same effect, as though complaint had been made. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant or complainants or petitioners.

2062. Investigation; report. 22 G. A., ch. 28, § 14. Whenever an investigation shall be made by said commissioners after notice as provided by section thirteen, of this act [§ 2061], it shall be their duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the commissioners are based, together with its or their recommendation or orders as to what reparation, if any, should

be made by the common carrier to any party, or parties, who may be found to have been injured; and such finding, so made shall thereafter in all judicial proceedings be deemed and taken as *prima facie* evidence as to each and every fact found. All reports of investigation made by said commissioners shall be entered of record, and a copy thereof shall be furnished to the party who may have complained and any other person or persons directly interested, and to any common carrier that may have been complained of.

2063. Findings; notice. 22 G. A., ch. 28, § 15. If in any case in which an investigation shall be made by said commissioners it shall be made to appear to the satisfaction of the commissioners, either by the testimony of witnesses or other evidence that anything has been done or omitted to be done in violation of the provisions of this act or of any law cognizable by said commissioners by any common carrier, or that any injury or damages has been sustained by the party or parties complaining or by other parties aggrieved in consequence of any such violation it shall be the duty of said commissioners forthwith to cause a copy of their report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both within a reasonable time to be specified by the commissioners; and if within the time specified it shall be made to appear to the commissioners that such common carrier has ceased from such violation of law and has made reparation for the injury found to have been done in compliance with the report and notice of the commissioners, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the commissioners and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

2064. Enforcement of orders. 22 G. A., ch. 28, § 16. Whenever any common carrier as defined in and subject to the provisions of this act shall violate or refuse or neglect to obey any lawful order or requirement of the said board of railroad commissioners, it shall be the duty of said commissioners, and lawful for any company or person interested in such order or requirement to apply in a summary way, by petition to the district or superior court in any county of this state in which the common carrier complained of has its principal office, or in any county through which its line or road passes or is operated, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity and without the formal pleadings and proceedings applicable to ordinary suits in equity but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit to direct and prosecute, in such mode and by such persons as it may appoint all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said commissioners shall be *prima facie* evidence of the matter therein, or in

any order made by them stated; and if it be made to appear to such court on such hearing or on the report of any such person or persons, that the order or requirement of said commissioners drawn in the question, has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction, or other proper process mandatory or otherwise to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said commissioners and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such courts to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other process mandatory or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of one thousand dollars for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process mandatory or otherwise; and such monies (moneys) shall, upon the order of the court, be paid into the treasury of the county in which the action was commenced and one-half thereof shall be transferred by the county treasurer to the state treasury; and the payment thereof may without prejudice to any other mode of recovering the same be enforced by attachment or order, in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court, saving to the commissioners and any other party or person interested the right to appeal to the supreme court of the state under the same regulations now provided by law in relation to appeals to said court as to security for such appeal except that in no case shall security for such appeal be required when the same is taken by said commissioners; but no appeal to said supreme court shall operate, to stay or supersede the order of the court, or the execution of any writ or process thereon; and such court may in every such matter order the payment of such costs and attorney and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented, or be prosecuted by the said commissioners, or by their direction it shall be the duty of the attorney-general of the state to prosecute the same, and in such prosecution he shall have the right to have the assistance of any county attorney of the county in which any such proceedings are instituted, and it is hereby made the duty of any such county attorney to render such assistance; and the costs and expenses on the part of said commissioners of any such prosecution shall be paid out of the appropriations for the expenses of said board of commissioners.

2065. Commissioners to make schedules. 22 G. A., ch. 28, § 17. The board of railroad commissioners of this state are hereby empowered and directed to make for each of the railroad corporations, doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of freight and cars on each of said railroads. and said power to make schedules shall include the power of classification of

all such freights, and it shall be the duty of said commissioners to make such classification; *provided,* that the said rates of charges to be so fixed by said commissioners shall not in any case exceed the rates which are or may hereafter be established by law; and said schedules so made by said commissioners, shall in all suits brought against any such railroad corporations, wherein is in any way involved the charges of any such railroad corporation for the transportation of any freight or cars or unjust discrimination in relation thereto be deemed and taken in all courts of this state as *prima facie* evidence that the rates therein fixed are reasonable and just maximum rates of charges for the transportation of freight and cars upon the railroads for which said schedules may have been respectively prepared. Said commissioners shall from time to time, and as often as circumstances may require, change and revise said schedules, subject to the same provision that the rates fixed are not to be higher than now or hereafter established by law. When any schedule shall have been made or revised as aforesaid, it shall be the duty of said commissioners to cause notice thereof to be published for two successive weeks in some public newspaper published in the city of Des Moines in this state, which notice shall state the date of the taking effect of said schedule and said schedule shall take effect at the time so stated in such notice and a printed copy of said revised schedule shall be conspicuously posted by such common carrier in each freight office and passenger depot upon its line or lines. All such schedules, so made, shall be received and held in all such suits as *prima facie* the schedule of said commissioners without further proof than the production of the schedule desired to be used as evidence, with a certificate of said railroad commissioners, that the same is a true copy of the schedule prepared by them for the railroad company or corporation therein named, and that notice of making the same has been published as required by law; *provided* that before finally fixing and deciding what the original maximum rates and classifications shall be, it shall be the duty of the railroad commissioners to publish ten days' notice in two daily papers published in Des Moines setting forth in such notice that at a certain time and place they will proceed to fix and determine such maximum rates and classification; and they shall at such time and place and as soon as practicable afford to any person, firm, corporation or common carrier who may desire it an opportunity to make an explanation or showing or to furnish information to said commissioners on the subject of determining and fixing such maximum rates and classification; and in any event the original schedule of rates and classification of freights on all lines of railroads in Iowa shall be fixed and shall go into effect within sixty days from the taking effect of this act.

The supreme court of the United States has decided that a statute of Minnesota giving the board of railroad commissioners authority to make a schedule of rates which shall be conclusive as to what are reasonable charges, without any opportunity for judicial investigation as to whether they are reasonable is unconstitutional. *Chicago, M. & St. P. R. Co. v. Minnesota,* 134 U. S., 418; *Minneapolis Eastern R. Co. v. Minnesota,* 134 U. S., 467.

Judge Brewer, of the United States Circuit Court for the southern district of Iowa, granted a preliminary restraining order against the commissioners to prevent them from putting into effect a schedule of rates under this section until it could be determined whether such rates would afford some compensation to the owners of railroad property. *Chicago & N. W. R. Co. v. Dey,*

et al. Railway Commissioners, 35 Fed. Rep., 866. Subsequently it was held that the evidence did not show that the rates would not be compensatory, and the restraining order was dissolved and a preliminary injunction refused. *Chicago, B. & Q. R. Co., v. Dey, et al., Railroad Commissioners*, 38 Fed. Rep., 656.

2066. Complaint of violation of schedule. 22 G. A., ch. 28, § 18. Whenever any person upon his own behalf, or class of persons similarly situated, or any firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, shall make complaint to said board of railroad commissioners, that the rate charged or published by any railroad company, or the maximum rates fixed by said commissioners in the schedules of rates made by them under the provisions of section seventeen of this act [§ 2065], or the maximum rate that now or hereafter may be fixed by law is unreasonably high or discriminating, it shall be the duty of said commissioners to immediately investigate the matter or such complaint. If such complaint appears to be well founded and not trivial in character, the board shall fix a day for hearing the same and shall notify the railroad company of the time and place of such hearing by mailing a notice properly directed to any division superintendent, general or assistant superintendent, general manager, president or secretary of such company, which notice shall contain the substance of the complaint so made, and the board shall also notify the person or persons complaining of such time and place.

Under this and the two following sections the complaint may be narrowly of a single matter or broadly of the rates fixed by the commissioners. They are not limited in their investigation to a single shipment but may establish a full schedule of rates for a single road. *Chicago, B. & Q. R. Co. v. Dey, et al., Railroad Commissioners*, 38 Fed. Rep., 656.

2067. Hearing; evidence. 22 G. A., ch. 28, § 19. Upon such hearing so provided for, the said commissioners shall receive whatever evidence, statements or arguments either party may offer or make pertinent to the matter under investigation; and the burden of proof shall not be held to be upon the person or persons making the complaint, but the commissioners shall add to the showing made at such hearing whatever information they may then have, or can secure from any source whatsoever, and the person or persons complaining shall be entitled to introduce any published schedules of rates of any railroad company, or evidence of rates actually charged by any railroad company for substantially the same kind of service, whether in this or any other state; and the lowest rates published or charged by any railroad company for substantially the same kind of service, whether in this or any other state, shall, at the instance of the person or persons complaining be accepted as *prima facie* evidence of a reasonable rate for the services under investigation, and if the railroad company complained of is operating a line of railroad beyond the state of Iowa, or if it appears that it has a traffic arrangement with any such railroad company, then the commissioners in determining what is a reasonable rate, shall take into consideration the charge made, or rate established by such railroad company or the company with which it has traffic arrangements for carrying freight from beyond the state to points within the state, and from within the state to points beyond

[the] state; and if such company be operating a line of railway beyond the state they shall also take into consideration the rate charged or established for a substantially similar or greater service by such company in any other state in which said railroad company operates a line of railway.

2068. Decision. 22 G. A., ch. 28, § 20. After such hearing and investigation the said commissioners shall fix and determine the maximum charge to be thereafter made by the railroad company or common carriers complained of, which charge shall in no event exceed the one now, or hereafter fixed by law, and the said commissioners shall render their decision in writing; and shall spread the same at length in the record to be keep for that purpose; such decision shall, specifically, set out the sums or rate which the railroad company or common carrier, so complained of, may thereafter charge or receive for the service therein named and including a classification of such freight, and the said commissioners shall not be limited in their said decision and the schedule to be contained therein to the specific case or cases complained of but it shall be extended to all such rates between points in this state and whatever part of the line of railway of such company or common carrier within this state as may have been fairly within the scope of such investigation, and any such decisions so made and entered on record of said commissioners, including any such schedules and classifications, shall, when duly authenticated be received and held in all suits brought against any such railroad corporation or common carrier wherein is in any way involved the charges of any such corporation or carrier mentioned in said decisions, in any of the courts of this state, as *prima facie* evidence that the rates therein fixed are reasonable maximum rates, the same as the schedules made by said commissioners as provided in section seventeen thereof [§ 2065]; and the rates and classifications so established after such hearing and investigation shall from time to time thereafter upon complaint duly made be subject to revision by said commissioners the same as any other rates and classifications.

2069. Proceedings of commissioners. 22 G. A., ch. 28, § 21. That the said board of railroad commissioners may in all cases conduct its proceedings when not otherwise particulary prescribed by law, in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the commissioners shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said commissioners may from time to time make or amend such general rules, or orders, as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform as nearly as may be to those in use in courts of this state. Any party may appear before said board of commissioners and be heard in person or by attorney. Every vote and official action of said board of commissioners shall be entered of record and its proceedings shall be public upon the request of either party or any person interested. Said board of railroad commissioners shall have an official seal, which shall be judicially noticed, and every commissioner shall have the right to administer oaths and affirmations in any proceeding pending before said board.

2070. Annual Reports. 22 G. A., ch. 28, § 22. The said board of railroad commissioners is hereby authorized to require annual reports from all

common carriers subject to the provisiors of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the said commissioners may need information. Such annual reports shall show in detail the amount of the capital stock issued, the amounts paid therefor, and the manner of the payment of the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the costs and value of the carrier's property, franchises and equipment; the number of employees, and the salaries paid each class; the amounts expended for improvements each year, how and where expended and the character of such improvements; the earnings and receipts from each branch of business, and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations, concerning fares or freights, or agreements, arrangements, or contracts with other common carriers as the commissioners may require; and the said board of commissioners may within its discretion for the purpose of enabling it the better to carry out the purpose of this act (if in the opinion of the commissioners it is practicable to prescribe such uniformity and methods of keeping accounts), prescribe a period of time within which all common carriers subject to the provisions of this act, shall have as near as may be a uniform system of accounts and the manner in which such accounts shall be kept.

[illegible] penalty. 22 G. A., ch. 28, § 23. If any railroad cor-

CHAPTER 27 OF THE ACTS OF THE TWENTY-FOURTH GENERAL ASSEMBLY.

REPORT TO RAILROAD COMMISSIONERS.

AN ACT to amend Section No. 22, of Chapter No. 28, of the Acts of the Twenty-second General Assembly, relating to reports to be made to the Board of Railroad Commissioners.

That section No. twenty-two (22) of chapter No. twenty-eight (28) of the acts of the twenty-second general assembly be amended by adding thereto, at the end thereof, the following words:

"Such reports shall also contain such other statistics of the road and of its transportation business for the year ending upon the 30th day of June of each year as the commissioners shall require, and all such reports shall be made to said board of railroad commissioners, on or before the 15th day of September of each year.

The board of railroad commissioners is also hereby authorized to require of any and all common carriers, subject to the provisions of this chapter, such other reports, besides the annual reports hereby required, as in the judgment of such board of commissioners shall be deemed necessary and reasonable. Such reports shall be in such form and concerning such subjects and be from such sources as the commissioners shall require, except as otherwise provided herein.

The time when such reports shall be filed shall be fixed by the board of railroad commissioners. Any corporation, company or individual owning or operatiog a railway within this state which shall fail, neglect or refuse to make any of the repoits provided for herein by the date fixed herein, or that fixed by the board of railroad commissioners, shall be subject to, and pay a penalty in the sum of one hundred dollars for each and every day of delay in making such reports after the date fixed.

Approved April 8, 1892.

[the] state; and if such company be operating a line of railway beyond the state they shall also take into consideration the rate charged or established for a substantially similar or greater service by such company in any other state in which said railroad company operates a line of railway.

2068. Decision. 22 G. A., ch. 28, § 20. After such hearing and investigation the said commissioners shall fix and determine the maximum charge to be thereafter made by the railroad company or common carriers complained of, which charge shall in no event exceed the one now, or hereafter fixed by law, and the said commissioners shall render their decision in writing; and shall spread the same at length in the record to be keep for that purpose; such decision shall, specifically, set out the sums or rate which the railroad company or common carrier, so complained of, may thereafter charge or receive for the service therein named and including a classification of such freight, and the said commissioners shall not be limited in their said decision and the schedule to be contained therein to the specific case or cases complained of but it shall be extended to all such rates between points in this state and whatever part of the line of railway of such company or common carrier within this state as may have been fairly within the scope of such investigation, and any such decisions so made and entered on record of said commissioners, including any such schedules and classifications, shall, when duly authenticated be received and held in all suits brought against any such railroad corporation or common carrier wherein is in any way involved the charges of any such corporation or carrier mentioned in said decisions, in any of the courts of this state as *prima facie*

common carriers subject to the provisiors of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the said commissioners may need information. Such annual reports shall show in detail the amount of the capital stock issued, the amounts paid therefor, and the manner of the payment of the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the costs and value of the carrier's property, franchises and equipment; the number of employees, and the salaries paid each class; the amounts expended for improvements each year, how and where expended and the character of such improvements; the earnings and receipts from each branch of business, and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations, concerning fares or freights, or agreements, arrangements, or contracts with other common carriers as the commissioners may require; and the said board of commissioners may within its discretion for the purpose of enabling it the better to carry out the purpose of this act (if in the opinion of the commissioners it is practicable to prescribe such uniformity and methods of keeping accounts), prescribe a period of time within which all common carriers subject to the provisions of this act, shall have as near as may be a uniform system of accounts and the manner in which such accounts shall be kept.

2071. Extortion; penalty. 22 G. A., ch. 28, § 23. If any railroad corporation or common carrier subject to the provisions of this act, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description or for the use and transportation of any railroad car upon its track, or any of the branches thereof, or upon any railroad within this state which it has the right, license or permission to use, operate or control or shall make any unjust and unreasonable charge prohibited in section two of this act [§ 2050], the same shall be deemed guilty of extortion, and shall be dealt with as hereinafter provided, and if any such railroad corporation (or common carrier) shall be found guilty of any unjust discrimination as defined in section three of this act [§ 2051], upon conviction thereof, shall be dealt with as hereinafter provided.

2072. Discrimination; punishment. 22 G. A., ch. 28, § 24. If any such railroad corporation shall charge, collect or receive for the transportation of any passenger or freight of any description upon its railroad for any distance within this state, a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation in the some direction of any passenger or like quantity of freight of the same class over a greater distance of the same railroad: or if it shall charge, collect or receive at any point upon its railroad a higher rate of toll or compensation for receiving, handling or delivering freight of the same class and quantity, than it shall at the same time charge, collect or receive for the transportation of any passenger or freight of any description over its railroad a greater amount as toll or compensation than shall at the same time be charged, collected or received by it for the transportation of any passenger or like quantity of freight of the same class being transported in the same direction over

any portion of the same railroad of equal distance; or if it shall charge, collect or receive from any person or persons a higher or greater amount of toll or compensation than it shall at the same time charge, collect or receive from any other person or persons for receiving, handling or delivering freight of the same class and like quantity, at the same point upon its railroad; or if it shall charge, collect or receive from any person or persons, for the transportation of any freight upon its railroad; a higher or greater rate of toll or compensation than it shall, at the same time, charge, collect or receive from any other person or persons, for the transportation of the like quantity of freight of the same class, being transported from the same point in the same direction, over equal distances of the same railroad, or if it shall charge, collect or receive, from any person or persons, for the use and transportation of any railroad car or cars upon its railroad, for any distance, a greater amount of toll or compensation than is at the same time charged, collected or received from any other person or persons, for the use and transportation of any railroad car of the same class or number, for a like purpose, being transported in the same direction, over a greater distance of same railroad; or if it shall charge, collect or receive from any person or persons, for the use and transportation of any railroad car or cars upon its railroad, a higher or greater compensation in the aggregate, than it shall, at the same time, charge, collect or receive from any other person or persons, for the use and transportation of any railroad car or cars of the same class for a like purpose, being transported from the same original point, in the same direction, over an equal distance of the same railroad; all such discriminating rates, charges, collection or receipts whether made directly or by means of any rebate, drawback, or other shift or evasion, shall be deemed and taken, against such railroad corporation, as *prima facie* evidence of the unjust discriminations prohibited by the provisions of this act; and it shall not be deemed a sufficient excuse or justification of such discrimination on the part of said railroad corporation, that the railway station or point at which it shall charge, collect or receive less compensation in the aggregate for the transportation of such passenger or freight, or for the use and transportation of such railroad car the greater distance than for the shorter distance, is a railway station or point at which then exists competition with any other railroad or means of transportation. This section shall not be construed so as to exclude other evidence tending to show any unjust discrimination in freight and passenger rates. The provisions of this section shall extend and apply to any railroad, the branches thereof, and any road or roads which any railroad corporation has the right, license or permission to use, operate or control wholly or in part, within this state; *provided*, however, that nothing herein contained shall be so construed as to prevent railroad corporations from issuing commutation, excursion or thousand-mile tickets; *provided* the same are issued alike to all applying therefor.

2073. Discrimination as to quantity. 22 G. A., ch. 28, § 25. It shall be unlawful for any such common carrier to charge, collect, demand or receive more for transporting a car of freight than it at the same time charges, collects demands or receives per car for several cars of a like class of freight over the same railroad, for the same distance, in the same direction, or to charge, collect, demand or receive more for transporting a ton of freight than it charges, collects, demands or receives per ton for several tons of

freight under a car load of a like class of freight over the same railroad for the same distance, in the same direction, or to charge, collect, demand or receives more for transporting a hundred pounds of freight than it charges, collects, demands or receives per hundred for several hundred pounds of freight, under a ton, of a like class of freight over the same railroad, for the same distance, in the same direction, all such discriminating rates, charges, collections or receipts, whether made directly or by means of any rebate, drawback or other shift or evasion, shall be deemed and taken against such railroad company as *prima facie* evidence of the unjust discrimination prohibited by this act; *provided,* however, that for the protection and development of any new industry within this state, such railroad company may grant concessions or special rates for any agreed number of car loads, but such special rates aforesaid shall first be approved by the board of railroad commissioners, and a copy thereof filed in the office thereof.

2074. Penalty for discrimination. 22 G. A., ch. 28, § 26. Any such railroad corporation guilty of extortion or making any unjust discrimination as to passenger or freight rates for the use and transportation of railroad cars or in receiving, handling or delivering freights shall upon conviction thereof be fined in any sum not less than one thousand dollars nor more than five thousand dollars for the first offense; and for every subsequent offense not less than five thousand dollars nor more than ten thousand dollars, such fine to be imposed in a criminal prosecution by indictment, or shall be subject to the liability prescribed in the next succeeding section to be recovered as therein provided.

2075. Forfeiture. 22 G. A., ch. 28, § 27. Any such railroad corporation guilty of extortion or of making any unjust discrimination as to passenger or freight rates or the rates for the use and transportation of railroad cars, or in receiving, handling or delivering freights shall forfeit and pay to the state of Iowa not less than one thousand dollars nor more than five thousand dollars for the first offense and not less than five nor more than ten thousand dollars for every subsequent offense to be recovered in a civil action by proceedings instituted in the name of the state of Iowa. And the release from liability or penalty provided for in section fifteen of this act [§ 2063] shall not apply to either a criminal prosecution under the last preceding section or a civil action brought under this section.

Although this section defines the action for penalty as a civil action, such an action brought by the state is in nature criminal and cannot be removed to the federal courts. *State of Iowa v. Chicago, B. & Q. R. Co.*, 37 Fed. Rep., 497.

2076. Suits by commissioners. 22 G. A., ch. 28, § 28. Whenever said railroad commissioners have good reason to believe, that any railroad corporation or common carrier subject to the provisions of this act has been guilty of extortion or unjust discrimination and thereby become liable to the penalties prescribed in sections twenty six and twenty-seven hereof [§§ 2074, 2075], it shall be their duty to immediately cause suits to be commenced and prosecuted against any such railroad corporation or common carrier. Such suits and prosecutions may be instituted in any county of this state through or into which the line of the railroad corporation sued for violation of this act may extend. And such railroad commissioners are hereby authorized,

when in their judgment, it is necessary so to do, to employ counsel to assist the attorney-general in conducting such suit on behalf of the state. No such suits commenced by said commissioners shall be dismissed unless the said commissioners and the attorney-general shall consent thereto. And the court may in its discretion give preference to such suits over all other business except criminal cases.

2077. Free transportation; reduced rates. 22 G. A., ch. 28, § 29. Nothing in this act shall apply to the carriage, storage or handling of property free or at reduced rates for the United States or this state or municipal governments or for charitable purposes, or to and from fairs and expositions for exhibition thereat or for the employees of such common carriers or their families or private property or goods for the family use of the employees of such common carriers, or the issuance of mileage, excursion or commutation passenger tickets. Nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to prevent railroads from giving free carriage to their own officers and employees and their families dependent upon said officer or employee for support and to persons in charge of live-stock being shipped from the point of shipment to destination and return, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies; *provided,* that no pending litigation shall in any way be affected by this act.

2078. Commissioners transported free. 22 G. A., ch. 28, § 30. The said railroad commissioners and their secretary shall have the right of free transportation in the performance of their duties concerning railroads, on all railroads and railroad trains in this state; and they may take with them experts or other agents whose services they may require and who shall in like manner be transported free of charge.

2079. Appropriation. 22 G. A., ch, 28, § 31. To defray the necessary expenses of the said railroad commissioners in making investigations and prosecuting suits and to pay all necessary costs attending the same under the provision of this act there is hereby appropriated, out of any money in the state treasury not otherwise appropriated, the sum of ten thousand dollars or so much thereof as may be necessary, to be drawn upon warrants of the state auditor issued upon the requisition of said commissioners, approved by the governor, which requisition shall be accompanied by an itemized statement of the costs and expenses to be paid.

2080. 22 G. A., ch. 28, § 32. Section eleven of chapter seventy-seven of the acts of the seventeenth general assembly in relation to the board of railroad commissioners, and all laws now in force in direct conflict with any of the provisions of this act, are hereby repealed.

*JOINT RATES.

Permitted. 23 G. A., ch. 17, § 1. That chapter twenty-eight of the acts of the twenty-second general assembly be and the same hereby is amended as follows: That said chapter twenty-eight of the acts of the twenty-second general assembly shall not be construed to prohibit the making of rates by two or more railroad companies for the transportation of property over two or more of their respective lines of railroad within this state, and a less charge by each of said railroad companies for its portion of such joint shipment than it charges for a shipment for the same distance wholly over its own line within the state, shall not be considered a violation of said chapter twenty-eight of the acts of the twenty-second general assembly, and shall not render such railroad company liable to any of the penalties of said act, but the provisions of this section shall not be construed to permit railway companies, establishing joint rates, to make by such joint rates any unjust discrimination between the different shipping points or stations upon their respective lines between which joint rates are established, and any such unjust discrimination shall be punished in the manner and by the penalties provided by chapter twenty-eight of the acts of the twenty-second general assemaly.

Reasonable through rates. 23 G. A., ch. 17, § 2. All railway companies doing business in this state shall, upon the demand of any person or persons interested establish reasonable joint through rates for the transportation of freight between points upon their respective lines within this state, and shall receive and transport freight and cars over such route or routes as the shipper shall direct. Car load lots shall be transferred without unloading from the cars in which such shipments were first made, unless such unloading in other cars shall be done without charge therefor to the shipper or receiver of such car load lots, and such transfer be made without unreasonable delay and less than car load lots shall be transferred into the connecting railway's cars at cost, which shall be included in and made a part of the joint rate adopted by such railway companies or established as provided by this act. When shipments of freight to be transported between different points within this state are required to be carried by two or more railway companies operating connecting lines, such railway companies shall transport the same at reasonable through rates and shall at all times, give the same facilities and accommodations to local or state traffic as they give to inter-state traffic over their lines of road.

In an action to restrain the commissioners from establishing joint rates under this act it is held (by a divided court) that the statute is constitutional and the action of the lower court in refusing to dissolve the preliminary injunction on motion was erroneous (the various points discussed in the opinion cannot be satisfactorily stated in a brief note). *Burlington, C. R. & N. R. Co. v. Railroad Comm'rs*, Sup. Ct. of Ia., Feb. 9, 1891 (not yet reported). [The opinion of the lower court is noted in 31 Cent. L. J., 305.]

* The act including the following five sections, entitled "An act to amend chapter twenty-eight of the acts of the twenty-second general assembly, giving authority for the making of rates for the transportation of freight and cars over two or more lines of railroad within this state and enlarging the powers and further defining the duties of the board of railroad commissioners," took effect by publication April 16, 1890.

Commissioners may establish. 23 G. A., ch. 17, § 3. In the event that said railway companies fail to establish through joint rates or fail to establish and charge reasonable rates for such through shipments, it shall be the duty of the board of railroad commissioners and they are hereby directed, upon the application of any person or persons interested, to establish joint rates for the shipment of freight and cars over two or more connecting lines of railroad in this state, and in the making of such rates and in changing or revising the same, they shall be governed as near as may be, by all the provisions of chapter twenty-eight of the acts of the twenty-second general assembly, and shall take into consideration the average of rates charged by said railway companies for shipments within this state for like distances over their respective lines, and rates charged by the railway companies operating such connecting lines for joint inter-state shipments for like distances. The rates established by the board of railroad commissioners shall go into effect within ten days after the same are promulgated by said board, and from and after that time the schedule of rates shall be prima facie evidence in all of the courts of this state [*] that the joint transportation of freight and cars upon the railroads for which such schedules have been fixed.

Notice; division. 23 G. A., ch. 17, § 4. Before the promulgation of such rates as provided in section three of this act, the board of railroad commissioners, shall notify the railroad companies interested in the schedule of joint rates fixed by them; and they shall give said railraad companies a reasonable time thereafter to agree upon a division of the charges provided for in such schedule, and, in the event of the failure of said railroad companies to agree upon a division and to notify the board of such agreement, the board of railroad commissioners shall, after a hearirg of the companies interested, decide the same, taking into consideration the value of terminal facilities and all the circumstances of the haul, and the division so determined by the board shall, in all controversies or suits between the railroad companies interested, be prima facie evidence of a just and reasonable division of such charges.

Unreasonable charges. 23 G. A., ch. 17, § 5. Every unjust and unreasonable charge for the transportation of freight and cars over two or more railroads in this state is hereby prohibited and declared to be unlawful, and each and every one of the companies making such unreasonable and unlawful charges, or otherwise violating the provisions of this act, shall be punished as provided in chapter twenty-eight of the acts of the twenty-second general assembly for the making of unreasonable charges for the transportation of freight and cars over a single line of railroad by a single company.

TAXES IN AID OF RAILROADS.

2081. 20 G. A., ch. 159, § 1. Chapter one hundred and twenty-three of laws of the sixteenth general assembly and chapter eighty-seven and one hundred and seventy-three of the laws of the seventeenth general assembly and chapter one hundred and ninety-two of the laws of the eighteenth general assembly and chapter one hundred and two of the laws of the nineteenth gen-

* In the bill as originally introduced and printed occur at this point the following words: "rates therein fixed are reasonable and just maximum rates for the." They were omitted, apparently by oversight, from the bill as afterwards reprinted with amendments and passed.

eral assembly are hereby repealed and the following is enacted instead thereof:

2082. By township, city or town; limit. 20 G. A., ch 129, § 2. Taxes not to exceed five per centum on the assessed value of any township, incorporated town or city may be voted to aid any railroad company which is or may become incorporated under the laws of the state of Iowa, to aid in the construction of a projected railroad within this state as hereinafter provided:

CHAPTER 18 OF THE ACTS OF THE TWENTY-FOURTH GENERAL ASSEMBLY.

VOTING TAX AID TO RAILROADS.

AN ACT to amend Chapter 159 of the Acts of the Twentieth General Assembly of the State of Iowa, to repeal Sections Nos. 2 and 4 thereof, and to enact substitutes for said sections [*Relative to tax voted in aid of railroads*].

bonds were being issued which had not yet passed into the hands of purchasers, an injunction should be granted to restrain their issuance. *Ibid*; *State ex rel. v. Wapello County*, 13-388.

Further, *held*, that the legislature had no constitutional power to authorize the levy of taxes by counties, cities or townships in aid of railroads. *State ex rel. v. Wapello County*, 13-388; *McMillen v. Boyles*, 14-107; *Smith v. Henry County*, 15-385; *Ten Eyck v. Mayor of Keokuk*, 15-486; *Hanson v. Vernon*, 27-28; *King v. Wilson*, 1 Dillon, 555.

But under subsequent similar statute, *held*, that such provisions were not unconstitutional, overruling the previous cases. *Stewart v. Board of Supervisors*, 30-9; *McGregar & S. C. R. Co. v. Birdsall*, 30-255; *Bonnifield v. Bidwell*, 32-149; *Renwick v. Davenport & N. W. R. Co.*, 47-511.

The present statute to the same effect is also upheld. *Snell v. Leonard*, 55-553; *Chicago, M. & St. P. R. Co. v. Shea*, 67-728.

The fact that the company in favor of which the tax is voted is organized

Commissioners may establish. 23 G. A., ch. 17, § 3. In the event that said railway companies fail to establish through joint rates or fail to establish and charge reasonable rates for such through shipments, it shall be the duty of the board of railroad commissioners and they are hereby directed, upon the application of any person or persons interested, to establish joint rates for the shipment of freight and cars over two or more connecting lines of railroad in this state, and in the making of such rates and in changing or revising the same, they shall be governed as near as may be, by all the provisions of chapter twenty-eight of the acts of the twenty-second general assembly, and shall take into consideration the average of rates charged by said railway companies for shipments within this state for like distances over their respective lines, and rates charged by the railway companies operating such connecting lines for joint inter-state shipments for like distances. The rates established by the board of railroad commissioners shall go into effect within ten days after the same are promulgated by said board, and from and after that time the schedule of rates shall be prima facie evidence in all of the courts of this state [*] that the joint transportation of freight and cars upon the railroads for which such schedules have been fixed.

CHAPTER 25 OF THE ACTS OF THE TWENTY-FOURTH GENERAL ASSEMBLY.

JOINT RATES ON RAILWAYS.

AN ACT to amend Chapter No. 17 of the Acts of the Twenty-third General Assembly [*Joint Rates on Railways*].

SECTION 1. That chapter seventeen of the acts of the twenty-third general assembly be amended by inserting between the words "the" and "joint" in the twentieth line of section No. three of said act the following words, to-wit. "Rates therein fixed are reasonable and just maximum rates for the."

SEC, 2. This act being deemed of immediate importance shall take effect and be in force from and after its publication in the Iowa State Register and Des Moines Leader, newspapers published at Des Moines, Iowa.

Approved April 7, 1892.

[illegible] tation of freight and cars over a single line of railroad by a single company.

TAXES IN AID OF RAILROADS.

2081. 20 G. A., ch. 159, § 1. Chapter one hundred and twenty-three of laws of the sixteenth general assembly and chapter eighty-seven and one hundred and seventy-three of the laws of the seventeenth general assembly and chapter one hundred and ninety-two of the laws of the eighteenth general assembly and chapter one hundred and two of the laws of the nineteenth gen-

* In the bill as originally introduced and printed occur at this point the following words: "rates therein fixed are reasonable and just maximum rates for the." They were omitted, apparently by oversight, from the bill as afterwards reprinted with amendments and passed.

eral assembly are hereby repealed and the following is enacted instead thereof:

2082. By township, city or town; limit. 20 G. A., ch 129, § 2. Taxes not to exceed five per centum on the assessed value of any township, incorporated town or city may be voted to aid any railroad company which is or may become incorporated under the laws of the state of Iowa, to aid in the construction of a projected railroad within this state as hereinafter provided:

CHAPTER 18 OF THE ACTS OF THE TWENTY-FOURTH GENERAL ASSEMBLY.

VOTING TAX AID TO RAILROADS.

AN ACT to amend Chapter 159 of the Acts of the Twentieth General Assembly of the State of Iowa, to repeal Sections Nos. 2 and 4 thereof, and to enact substitutes for said sections [*Relative to tax voted in aid of railroads*].

SECTION 1. Section 2 and section 4 of said chapter No. 159 of the acts of the twentieth general assembly are hereby repealed, and the following sections enacted in lieu thereof.

"Section 2. That taxes not to exceed five per centum on the assessed value of any township, incorporated town or city may be voted to aid any railroad company which is or may become incorporated under the laws of the state of Iowa, to aid in the construction of a projected railroad within this state as hereinafter provided."

"Section 4. The stipulations and conditions in the notices prescribed in said act, must conform to those set forth in the petition asking the election; and the aggregate amount of tax voted or levied after the passage of this act, under the provisions of said chapter 159 of the acts of the twentieth general assembly, as amended by chapter 19 of the acts of the twenty-third general assembly, in any township, incorporated town or city shall not exceed five per centum of the assessed value of the property therein respectively."

SEC. 2. This act being deemed of immediate importance shall take effect upon publication in the Iowa State Register and Des Moines Leader, newspapers published in Des Moines Iowa.

Approved April 26, 1892.

[illegible] bonds were being issued which had not yet passed into the hands of purchasers, an injunction should be granted to restrain their issuance. *Ibid*; *State ex rel. v. Wapello County*, 13-388.

Further, *held*, that the legislature had no constitutional power to authorize the levy of taxes by counties, cities or townships in aid of railroads. *State ex rel. v. Wapello County*, 13-388; *McMillen v. Boyles*, 14-107; *Smith v. Henry County*, 15-385; *Ten Eyck v. Mayor of Keokuk*, 15-486; *Hanson v. Vernon*, 27-28; *King v. Wilson*, 1 Dillon, 555.

But under subsequent similar statute, *held*, that such provisions were not unconstitutional, overruling the previous cases. *Stewart v. Board of Supervisors*, 30-9; *McGregar & S. C. R. Co. v. Birdsall*, 30-255; *Bonnifield v. Bidwell*, 32-149; *Renwick v. Davenport & N. W. R. Co.*, 47-511.

The present statute to the same effect is also upheld. *Snell v. Leonard*, 55-553; *Chicago, M. & St. P. R. Co. v. Shea*. 67-728.

The fact that the company in favor of which the tax is voted is organized

Commissioners may establish. 23 G. A., ch. 17, § 3. In the event that said railway companies fail to establish through joint rates or fail to establish and charge reasonable rates for such through shipments, it shall be the duty of the board of railroad commissioners and they are hereby directed, upon the application of any person or persons interested, to establish joint rates for the shipment of freight and cars over two or more connecting lines of railroad in this state, and in the making of such rates and in changing or

ition of freight and cars over a single line of railroad by a single company.

TAXES IN AID OF RAILROADS.

2081. 20 G. A., ch. 159, § 1. Chapter one hundred and twenty-three of laws of the sixteenth general assembly and chapter eighty-seven and one hundred and seventy-three of the laws of the seventeenth general assembly and chapter one hundred and ninety-two of the laws of the eighteenth general assembly and chapter one hundred and two of the laws of the nineteenth gen-

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eral assembly are hereby repealed and the following is enacted instead thereof:

2082. By township, city or town; limit. 20 G. A., ch 129, § 2. Taxes not to exceed five per centum on the assessed value of any township, incorporated town or city may be voted to aid any railroad company which is or may become incorporated under the laws of the state of Iowa, to aid in the construction of a projected railroad within this state as hereinafter provided:

[As to the limitation of amount, see also § 2084.]

Constitutionality. Under the constitution of 1846, *held*, that counties might, by a public vote, be authorized to issue bonds in aid of a railway to be constructed through the county. *Dubuque County v. Dubuque & P. R. Co.*, 4 G. Gr., 1.

Also, *held*, under the provisions of Code of '51, that counties had authority by popular vote to issue bonds in subscription for the stock of a railway. *Clapp v. Cedar County*, 5–15; *Ring v. Johnson County*, 6–265.

Where such bonds were issued, *held*, that they were valid in the hands of a purchaser, and he need not go behind the records of the county to ascertain whether authority had been properly conferred upon the county officers to issue such bonds. *Clapp v. Cedar County*, 5–15.

Under the cases holding that the county had authority to subscribe for stock in aid of railway corporations, *held*, that irregularities in submitting the proposition to subscribe to such stock to the electors of the county might be cured by a legalizing act of the legislature. *McMillen v. Boyles*, 6–304; *S. C.*, 6–391.

Held, also, that the county might vote taxes in aid of railroads. *Games v. Robb*, 8–193.

Where a county voted the issuance of bonds in aid of a railroad under the agreement that the county should receive certificates of stock of like amount, *held*, that delivery of such certificates was not a condition precedent to the delivery of the bonds. *State ex rel. v. County Judge*, 9-288.

It was held also that the power to subscribe for stock of a railroad and issue bonds in payment therefor might be conferred upon the county by the legislature, and, if conferred, the bonds issued in pursuance of such authority or duly legalized if issued originally without authority, would be valid. *Stokes v. Scott County*, 10–166.

But, *held*, that a county had no authority without legislative grant to issue bonds in subscription for stock of a railway company. *Ibid.*

And, *held*, that the case above cited, upholding the authority of the county to issue bonds or vote a tax in aid of railroads, were erroneously decided, and that such power was not conferred by the provisions of the Code of '51. *Ibid.*

Therefore, *held*, that where, in the pursuance of the submission of such a proposition to vote, and the adoption thereof by the voters of the county, bonds were being issued which had not yet passed into the hands of purchasers, an injunction should be granted to restrain their issuance. *Ibid*; *State ex rel. v. Wapello County*, 13–388.

Further, *held*, that the legislature had no constitutional power to authorize the levy of taxes by counties, cities or townships in aid of railroads. *State ex rel. v. Wapello County*, 13-388; *McMillen v. Boyles*, 14-107; *Smith v. Henry County*, 15-385; *Ten Eyck v. Mayor of Keokuk*, 15-486; *Hanson v. Vernon*, 27-28; *King v. Wilson*, 1 Dillon, 555.

But under subsequent similar statute, *held*, that such provisions were not unconstitutional, overruling the previous cases. *Stewart v. Board of Supervisors*, 30-9; *McGregar & S. C. R. Co. v. Birdsall*, 30-255; *Bonnifield v. Bidwell*, 32-149; *Renwick v. Davenport & N. W. R. Co.*, 47-511.

The present statute to the same effect is also upheld. *Snell v. Leonard*, 55–553; *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

The fact that the company in favor of which the tax is voted is organized

as a railroad and telegraph company will not affect its validity. *Snell v. Leonard*, 55–553.

Repeal of statute. Where, prior to the repeal of the act authorizing the levy of taxes in aid of a railroad in pursuance of a popular vote, the company in favor of which the tax is voted has expended money in constructing its road, relying upon such tax, it has a right, notwithstanding the repeal of the statute, to have the tax levied and collected in its favor. *Burges v. Mabin*, 70–633.

Where a tax was voted in December, 1883, and the law under which it was voted was repealed in April following, and after the voting of the tax the company engaged as actively in the preparation for the work of construction as it could well do at that season of the year, and in the opening of the spring prosecuted its work with energy and complied with the contract on its part, *held* that the expenditures and work done in faith of the tax voted were sufficient to entitle the company to such tax. *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

The right to the tax and penalties and interest thereon is not taken away by the repeal of the statute under which the tax is voted, but repeal of the statute terminates the right to additional penalties. *Tobin v. Hartshorn*, 69–648.

The statute of limitations, as against an action to enforce a tax voted under a statute afterwards repealed, *held* to commence to run only in accordance with provisions of new statute. *Harwood v. Brownell*, 48–657.

Where a railroad was constructed by another corporation than that in whose behalf the tax was voted, and it did not appear that such construction was made in reliance upon the tax voted, or that the right to the tax was transferred to the other contracting road, *held*, that such tax could not be levied or collected after repeal of statute under which it was voted. *Barthel v. Meader*, 72–125.

Cities under special charter may vote a tax as here provided. *Bartemeyer v. Rohlfs*, 71–582.

2083. Petition; notice; submission; certificate; levy; collection. 20 G. A., ch, 159, § 3. Whenever a petition shall be presented to the council or trustees of any incorporated town or city, or the trustees of any township signed by a majority of the resident freehold taxpayers of such township, incorporated city or town asking that the question of aiding any railroad company incorporated under the laws of the state of Iowa in the construction of a projected railroad within this state be submitted to the voters thereof, it shall be the duty of the trustees or council of such incorporated town or city or trustees of such township to immediately give notice of a special election by publication in some newspaper published in said incorporated town, city or township if any be published therein, and if not, then in some newspaper published in the county if any such there be and also by posting copies of said notice in five public places in such township, incorporated city or town at least ten days before said election which notice shall specify the time and place of holding said election, the name of the company and the line of the road proposed to be aided, the rate per centum of the tax to be levied, whether one-half of said tax shall be collected the first year and one half the following year, or the whole thereof to be collected in one year, the amount of work required to be done, and when and where the same shall be done, to what point said railroad shall be fully completed and any other conditions which shall be performed before such tax or any part thereof shall become due, collectible and payable, and in no case shall such tax become due, collectible or payable until such railroad is fully completed according to the conditions in said notice. At such election the question of taxation shall

be submitted. The form of the ballots shall be "for taxation" and "against taxation" and if a majority of the votes polled be "for taxation" then the recorder of the incorporated town, city or township clerk or clerk of election shall forthwith certify to the county auditor the result of said election, the rate per centum of tax thus voted, the year or years during which the same is to be collected, the name of the company to which voted, and the time, terms, and conditions upon which the same, when collected, is to be paid to the railroad company under the conditions and stipulations in said notice, together with an exact copy of the notice under which the election was held, which the county auditor shall at once cause to be recorded in the office of the recorder of deeds of the county; and the expense thereof and of publishing said notices and all the expenses of said election shall be paid by the railroad company to which it is proposed to vote said tax. When such certificates shall have been made and recorded the board of supervisors of the county shall at the time of levying the ordinary tax next following, levy such taxes as are voted under the provisions of this act as shown by said certificate, and cause the same to be placed on the tax list of the proper township, incorporated city or town, indicating in their order thereupon when and in what proportion the same are to be collected and upon what conditions the same are to be paid to the railroad company, a certified copy of which order shall accompany the tax lists. Said taxes shall be collected at the time or times specified in said order in the same manner and subject to the same laws after they are collectible as other taxes, or as may be stated in the petition and notices for the election.

Petition for tax. A resident tax payer of the township may sign the petition for an election by the township to vote a tax in aid of a railroad, although he is also a resident and voter of an incorporated town or city within the limits of such township. *Ryan v. Varga*, 37–78.

Under a previous statute, *held*, that one-third of the tax payers and not one-third of the resident tax payers must sign the petition. *Zorger v. Township of Rapids*, 36–175.

Action of trustees. The action of the township trustees in calling an election in pursuance of the petition, *held* to be of a judicial or *quasi*-judicial character, so that the question whether such action was illegal or without jurisdiction might be determined on *certiorari*. *Jordan v. Hayne*, 36–9.

The trustees may decide this question upon their own knowledge. *Ibid.*

Where a proper petition was presented and acted upon at a called meeting of the trustees, of which one member had no notice on account of being out of the township, *held* that the action of the majority was valid. *Young v. Webster City & S. W. R. Co.*, 75–140.

Although the petition is not signed by the requisite number of tax payers, if the trustees have decided it to be sufficient and ordered an election, and the tax has been voted and levied, the validity of the tax cannot be assailed for such defect in the petition. The defect can only be taken advantage of in some method provided for direct review. *Ryan v. Varga*, 37–78; *West v. Whitaker*, 37–598.

But where the finding of the trustees was that the petition was signed by one-half of the resident freehold tax payers, when the statute required that it be signed by a majority, *held*, that although they ordered an election, subsequent proceedings were void. *Slack v. Blackburn*, 64–373.

Township embracing city or town If the township embraces an incorporated town, and it is proposed that a township shall aid in the construction of the road, the voters in the corporation are entitled to vote at such election. *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

Where the township embraces territory not within the corporate limits of

a city situated in such township, the township trustees are the proper persons to order such election. *Young v. Webster City & S. W. R. Co.*, 75–140.

Notice. The statute provides that the notice shall specify to what point the road shall be fully completed before the tax can be collected, and if the notice does not so specify the election will be void. *Allard v. Guston*, 70–731; *Kleise v. Galusha*, 78-310.

Publication. This section does not require newspaper publication to be made ten days before election. The selection of the newspaper is to be made immediately, but of course the time of publication will depend upon the day of issue of the paper. *Johnson v. Kessler*, 76-411.

Ballots. Where the ballots upon the question of voting a tax in aid of a railroad were "taxation" and "no taxation," *held*, that the form of ballots was sufficient. *West v. Whitaker*, 37–598.

In a particular case, *held*, that the ballots were sufficient although they contained matter not necessary. *Cattell v. Lowry*, 45–478.

Undue influence at election. Where it appeared that an agent authorized by the company for whom the tax was being voted to represent it in procuring the voting of the tax for a compensation agreed upon made promises to voters that all resident tax payers who voted for the tax would receive fifty cents on the dollar on their certificates when issued, and thereby induced some of the voters to change their minds as to the vote which they would cast with reference to such tax, *held*, that the tax was thereby rendered illegal. *Chicago, M. & St. P. R. Co. v. Shea*, 66-728.

In a particular case, *held*, that the evidence did not show that tax payers were induced to sign the petition to vote for the tax, upon any offer or promise of exemption from payment. *Young v. Webster City & S. W. R. Co.* 75–140.

Where the submission of the proposition and its adoption are procured by false statements and fraudulent representations of the company and its agents the tax cannot be enforced. *Sinnet v. Moles*, 38-25; and see § 2088.

Expenses of election in townships for the purpose of voting aid to railroads are not chargeable to the county. *McBride v. Hardin County*, 58–219.

Certificate as to result of election. The certificates of the clerk of election required by the statute in order to authorize the board of supervisors to levy a tax should set out the conditions under which the tax was voted, and it is not sufficient to attach and refer to the notice of the election in which such conditions are stated. *Minnesota & I. S. R. Co. v. Hiams*, 53-501.

Where the township clerk filed with the county auditor such records of proceedings as showed what was required to be certified by such clerk, *held*, that the certificate was sufficient to support the tax, although not contained in one paper; a substantial compliance with the law being deemed sufficient. *Shontz v. Evans*, 40–139.

Where there is a certificate which is defective, and the board of supervisors has determined that the certificate sufficiently complies with the law, the correctness of such decision cannot be collaterally attacked by an action to enjoin the collection of the tax. *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

Where by mistake of the clerk the certificate has been improperly issued the collection of the tax may be restrained by injunction. *Cattell v. Lowry*, 45–478.

Levy. Where certain taxes were properly voted and certified, and the board of supervisors levied "all . . . railroad taxes that have been certified according to law," and the railroad tax in question was accordingly placed upon the tax list, *held*, that the levy was sufficient. *Casady v. Lowry*, 49–523.

The levy of a railroad aid tax *held* sufficient in a particular case, it being mentioned in the resolution enumerating the different taxes as "railroad tax," and being made certain as to amount by reference to the proper records of proceedings of the township for voting such tax. *Shontz v. Evans*, 40–139.

Where a committtee of the board of supervisors recommended in a report that certain taxes be levied, which included the tax in question, and it appeared from the record that the report was adopted, the names of those

voting in favor thereof being given, *held*, that the levy was sufficient. *West v. Whitaker*, 37–598.

A levy of taxes in different townships is to be considered as distinct, even though such separate levies are made by one resolution. *Woodworth v. Gibbs*, 61–398.

The action of the board in making the levy is not judicial but purely ministerial; their action in so doing may be questioned in a collateral proceeding, and held void for want of power to do it at the time it was done. *Scott v. Union County*, 63–583.

Authority to vote and levy the tax rests upon a substantial compliance with the requirements of the statute in the performance of the conditions upon which the authority is granted. *Allard v. Guston*, 70–731.

Under 12 G. A., ch. 48, *held*, that no levy by the board of a tax properly voted by a township was necessary, and that therefore such levy could not be compelled by *mandamus*. *Chicago, D. & M. R. Co. v. Olmstead*, 43–316.

Where a tax in aid of a railway was voted in March, *held*, that the levy was properly made upon the assessment of the same year, although the books were not returned until after that date. *Parsons v. Childs*, 36–108.

Without fixing any definite rule for all cases the court *held* (by a majority opinion), that where a tax was voted in December, 1883, it was properly levied on the assessment of that year. *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

As to levy, see *Bartemeyer v. Rohlfs*, 71–582.

Entry of tax on tax list *held* not necessary under 12 G. A., ch. 48. *Harwood v. Brownell*, 48–657.

Validity. Where the validity of such a tax has been adjudicated in an action against the treasurer and the board of supervisors by parties claiming the tax, it cannot, in the absence of collusion or fraud, be again called in question in an action by a tax payer against the treasurer to enjoin its collection. *Lyman v. Faris*, 53–498.

Collection of tax. Although it may be the duty of the treasurer to proceed to collect the tax when due, he could not, under previous statutes, be compelled by the company to do so until it had showed itself entitled thereto. *Harwood v. Case*, 37–692.

Under a subsequent statute the tax did not become delinquent until the company was entitled to the tax and the whole amount thereof, and as to taxes levied before the passage of such act, *held*, though retrospective, it was not invalid. *Ibid.*

Where it appeared that the company was entitled to only a part of the tax, and such part was not claimed merely as an installment, *held*, that the part claimed would not be regarded as an installment, but in satisfaction of the whole tax, and as such might be collected. *Casady v. Lowry*, 49–523.

The county has no interest in tax collected, and if it is to be refunded it should be refunded by the treasurer without any warrant or order of the board of supervisors. In the case of misappropriation by the treasurer the loss would not fall upon the county. *Barnes v. Marshall County*, 56–20.

A claim for the refunding of a portion of the tax is against the fund and not against the county. *Ibid.*

The county cannot be made liable for any part of a railroad tax paid into the county treasury. Where a railroad tax illegally collected remains in the treasury the proper officer may be compelled to refund the same by an action against him, but an action for the amount cannot be maintained against the county. *Eyerly v. Jasper County*, 72–149.

Money paid under such tax is a trust fund in the hands of the treasurer, the tax payers and the railroad company, both being beneficiaries. Pending an action by tax payers to test the validity of the tax, the statute of limitation does not run against an action by *mandamus* to compel the treasurer to refund such money to the tax payers. *Eyerly v. Supervisors of Jasper County*, 77–470.

Money in the hands of a county treasurer collected as a railroad tax does not belong to the county nor to the railroad company, but to the tax payer, and an action of *mandamus* to compel the repayment of money collected on such taxes can not be maintained by a tax payer against the board of super-

visors of the county, such money never having become a part of the county fund. *Eyerly v. Board of Supervisors of Jasper County*, 46 N. W. Rep., 986.

A railway company entitled to the proceeds of a tax paid into the treasurer may recover the amount thereof on the bond of the treasurer to whom the money is paid. The company can not maintain *mandamus* against the successor of such treasurer who has never received the money collected. *Cedar Rapids, I. F. & N. W. R. Co. v. Cowan*, 77-535.

Where such taxes do not remain in the hands of the treasurer as a distinct fund, but have been placed in the general fund and expended in paying ordinary indebtedness of the county, judgment may be rendered against the county therefor. *Merrill v. Marshall County*, 74-24.

Conditions and Stipulations. No contract, stipulation or reservation could, under the previous act, be set up to defeat the tax unless it was in writing. *Muscatine Western R. Co. v. Horton*, 38-33; *Harwood v. Quinby*, 44-385.

The omission to state in the levy the condition upon which it is to be paid to the company will not render the levy invalid when the condition was complied with before the levy. *Burges v. Mabin*, 70-633.

Where a condition on which the taxes in aid of a railroad was that "the road should be built and in operation" by the time fixed, *held*, that such condition was sufficiently complied with if the trains were running by the time specified, although it was necessary in order to the completion of the road that it be ballasted and additional ties put in. *Muscatine Western R. Co. v. Horton*, 38-33.

Where the road is completed in accordance with the conditions of a written contract between the company and the township voting the tax, a failure of the company to comply with the just expectations of the voters which have not been embodied in the contract will not forfeit the tax. *Ibid.*

Where one of the conditions on which a tax was voted was that the road should be constructed and operated, and a depot located within a town named, on or before a certain day, and by that date the depot was partially erected and a track was laid for the distance of a mile from such depot, and the road was operated, although not in a first-class manner, the track not being ballasted, *held*, that there was a sufficient compliance with the conditions of the tax to entitle the railway to the same. *Chicago, M. & St. P. R. Co. v. Shea*, 67-728.

The failure of the corporation to perform its contract as to the time of the completion of the road will not release stockholders from their subscriptions. *Johnson v. Kessler*, 76-411.

In a particular case, *held*, that the construction of the road was not such as to constitute a compliance with the conditions on which the aid tax had been voted. *Cox v. Forest City & S. R. Co.*, 66-289.

Where a tax was voted to be expended in three townships mentioned, *held*, that it appearing that more than the amount of tax voted had been expended in the township in question, the company was entitled to the tax in that township although nothing had been expended in the other two townships. *Merrill v. Welsher*, 50-61.

Also, *held*, that the fact that the line of the road was changed so that it did not pass through one of the townships specified, would not prevent the collection of the tax in the township through which it did pass.

Also, *held*, under a special statute, that a mere suspension of work and failure to build the road for the period of four years mentioned in such statute was not the non-fulfillment of a special contract or agreement as therein specified, and did not amount to a forfeiture of the tax. *Ibid.*

Where the articles of incorporation of the company declared its purpose to be to construct a railroad by way of Newton, in Newton township, and the petition and notice for the voting of a tax in that township specified that it was for the purpose of aiding in the construction of the road to be expended in Newton and another township named, *held*, that without the construction of the line to Newton, the tax in Newton township could not be enforced, although double the amount of such tax had been expended in the other townships. *Lamb v. Anderson*, 54-190.

It is a sufficient designation of the terminal point of a proposed line to state

that it is to run in a certain direction to the connection with another line. It is sufficient completion of the line that the track is laid and cars run thereon. *Yarish v. Cedar Rapids, I. F. & N. W. R. Co.*, 72-556.

Where the notice specified that the road should be built between a certain city and a point on another road so as to make a continuous line of railway from said city to certain coal mines of the latter road, *held*, that the construction of a road from the city to the junction with the other road was all that was required. *Young v. Webster City & S. W. R. Co.*, 75-140.

Where the articles of the corporation in whose favor a tax was voted, specified its objects to be to construct, operate and maintain a railroad from Dubuque in a westerly and northwesterly direction through Iowa Minnesota and Dakota to a junction with the Northern Pacific and the road was accordingly constructed, extending from Dubuque to St. Paul, the reaching of the point specified, not being made a condition of the payment of the tax, *held*, that there was not such failure to comply with conditions as to work a forfeituret *Cantillon v. Dubuque & N. W. R. Co.*, 78-48.

Where a paper was signed by the president of a company, bearing the seal of the corporation, and was circulated among the electors on the day of election, containing certain stipulations in regard to the construction of the road for which the tax was being voted, *held*, that the provisions of such paper became binding upon the company. *Meeker v. Ashley*, 56-188.

Where the president of the company made statements at a public meeting called to discuss the voting of a tax in aid of a railway, which tended to induce tax payers to believe that the road, if built, would be located upon a line already surveyed and known to them, and afterwards the road was built upon a different line, less advantageous to the tax payers, *held*, that the collection of the tax could be enjoined. *Curry v. Supervisors*, 61-71.

As to notice see, *Bartemeyer v. Rohlfs*, 71-582.

Narrow Guage. Where a tax was voted in aid of a railroad between certain termini and a narrow guage road was constructed, *held*, that that fact would not defeat the company's right to the tax, it not having been specified in the notice of election what the guage of the road should be, and it appearing that the road as constructed answered the purpose of the tax payers. *Meader v. Lowry*, 45-684.

And in such case, *held*, that the township trustees were not guilty of any fraud in certifying the construction of the road as contemplated in the notice submitting the question of levying the tax. *Ibid.*

The construction of a narrow gauge road having sufficient capacity for all the business to be done, and capable of doing it as economically as a road of any other gauge, is a sufficient compliance with the provisions for the voting of the tax, where no stipulation as to the gauge is made, to entitle the company to the tax voted. *Casady v. Lowry*, 49-523.

Estoppel. where tax payers and citizens of the township, seeing and knowing that the company is expending money within the township in the construction of its road, stand by and make no complaint or objection on account of a technical defect in the notice of election they are estopped from afterward making such objection. *Burlington, C. R. & M. R. Co. v. Stewart*, 39-267; *Lamb v. Burlington, C. R. & M. R. Co.*, 39-333; *Johnson v. Kessler*, 76-411.

When conditions and representations have not been complied with, the tax payer will not be estopped from enjoining the collection of the tax by the fact that the road has been built, where it appears that notice was given to the company before the construction of the road upon the new line that the tax would be contested on the ground of fraud and false representations. *Curry v. Supervisors*, 61-71.

Where it is not shown that the party objecting to the validity of a railroad aid tax had any knowledge thereof at the time it was expended, he will not be estopped from questioning its validity afterward. *Truesdell v. Green*, 57 215.

Purchase or leasing of another road. The leasing or purchase and operation of a line of road as a part or whole of the line for the construction of which the tax is voted will not constitute a compliance with the agreement

to construct such road. *Lamb v. Anderson*, 54–190; *Meeker v. Ashley*, 56–188; *Iowa, M & N. P. R. Co. v. Schenck*, 56–628; *Lawrence v. Smith*, 57–701.

Alienation. Where the company to which a tax has been voted has, upon the faith of the tax, constructed the road and put it in operation, such company becomes entitled to the tax, and this right is not forfeited by a subsequent alienation of the road to another company. *Parsons v. Childs*, 36-108.

The fact that a road in aid of which taxes are voted is sold at or before the time of its completion to another company will not defeat the right of the company in whose favor the tax is voted to receive the same. *Muscatine Western R. Co. v. Horton*, 38–33.

The alienation of the road before the payment of the tax, so that shares of stock in the road for which the tax was voted can no longer be issued to those holding certificates for the payment of such taxes as provided by statute, is a ground for setting such tax aside and releasing the tax payer from his burden. *Manning v. Matthews*, 66–675; *Blunt v. Carpenter*, 68–265.

The right of the tax payer to receive such certificates of stock in exchange for his receipts for taxes paid cannot be set aside by agreement or waiver, and the electors cannot vote and appropriate taxes for the construction of a road without giving to the tax payer stock in the corporation as the statute provides. *Blunt v. Carpenter*, 68–265. But see notes to § 2086.

But the lease of the road in favor of which the tax is voted in perpetuity to another road, by which the latter agrees to operate the line and pay the lessor company a per cent of the gross earnings, it not appearing that the contract of lease is inequitable or not beneficial to the company constructing the road, will not deprive the company of the right to the tax. *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

The county having collected a railroad aid tax cannot resist payment of it to the company because the company has sold and conveyed its property and franchises. Such a defense can only be interposed by the tax payer. *Merrill v. Marshall County*, 74–24.

Change of line. The fact that, after a tax in aid of a railroad is voted, the location of the line in a part of its course is changed, which change, however, is not in conflict with any of the conditions upon which the tax is voted, will not affect its validity. *Shontz v. Evans*, 40–139.

A private individual cannot, on account of private injuries to him alone, maintain an action of *mandamus* to compel a railway company which has received the benefit of taxes voted by the public to operate its line as it was originally located. *Crane v. Chicago & N. W. R. Co.*, 74–330.

2084. Notice; conditions; limit of tax. 20 G. A., ch. 159, § 4. The stipulations and conditions contained in the said notices must conform to those set forth in the petition asking the election, and the aggregate amount of tax to be voted or levied under the provisions of this act in any township, incorporated town or city shall not exceed five per centum of the assessed value of the property therein respectively.

Under the statutory provision that a township, town or city, having voted a tax to the amount of five per centum upon its taxable property in aid of railroads, cannot impose another tax upon property for that purpose, *held*, that the power conferred to levy such taxes ceases upon a levy of taxes to that amount, but that taxes duly levied which have been abandoned or become uncollectible cannot be taken into account. *Dumply v. Supervisors of Humboldt County*, 58-273.

An increase in value of taxable property after levy of the five per centum of taxes does not confer the power to make an additional levy. *Ibid.*

Taxes levied under a prior act providing for such taxation, although such act contained the same limitation as the present act, cannot be taken into account in determining whether the limit fixed in the present act has been exceeded. *Scott v. Union County*, 63-583.

Where, at the time of voting the tax under the present act, a prior tax of five per cent stood uncanceled, but before the levy of the tax thus voted the prior tax was canceled, *held*, that the second tax was valid. The statute should be construed as if it provided that the aggregate amount of tax to be voted and levied shall not exceed five per cent. *Williams v. Poor*, 65-410.

Penalties accruing on a railroad aid tax are not to be taken into account in determining whether the amount of tax exceeds the limit fixed by statute. *Tobin v. Hartshorn*, 69-648; *Chicago, M. & St. P. R. Co. v. Hartshorn*, 30 Fed. Rep., 541.

2085. Money paid out; certificate. 20 G. A., ch. 159, § 5. The moneys collected under the provisions of this act shall be paid out by the county treasurer to the treasurer of the railroad company for whom the same was voted upon the orders of the president or managing director thereof at any time after the trustees of such township, or trustees or council of such incorporated town or city voting said tax, or a majority of them, shall have certified to the county treasurer that the conditions required of the railroad company and set forth in the notice for the special election at which the tax was voted have been complied with, and said township trustees, or trustees or council of such incorporated town or city shall make said certificate when the said conditions have been complied with sufficiently to entitle the said railroad company to the amount of such orders, or when the said conditions are fully complied with and performed on the part of the railroad company; but if the costs and expenses of holding said election and of recording said certificates shall not have been paid by the railroad company, then the county treasurer shall first deduct from the moneys so collected the amount of said costs and expenses and pay the same over to the parties entitled thereto.

[By § 527 the township trustees are authorized to employ counsel in litigation to which they are made parties, concerning their right or duty to levy taxes which have been authorized upon express conditions. By § 1977 provision is made for changing the conditions under which a road has been built.]

Fee for collection. The treasurer is not authorized to deduct from the tax collected three per cent for its collection. Sec. 5067 does not authorize such deduction. *Merrill v. Marshall County*, 74-24.

Certificate. The certificate of the township trustees of the compliance of the company with the terms on which the tax is voted need only be properly signed. It need not appear that there is a previous resolution or order authorizing its issuance. *Merrill v. Welsher*, 50-61.

Under a certificate in such case that the company had "so complied with the act as to entitle it to draw the sum of," etc., *held*, that as the company could not have been entitled to draw any sum until it had complied with the act, the certificate was sufficient. *Casady v. Lowry*, 49-523.

The certificate of the trustees is not a judicial act and is not conclusive, its only purpose being to authorize the treasurer to pay over the funds collected. It has nothing to do with the treasurer's right to collect the tax. *Lamb v. Anderson*, 54-190.

The duty of the trustees as to giving a certificate of completion of a road is only to determine whether it is completed, and they should not refuse to give it on the ground of fraud in the election, or in the certificate of the engineers. *Harwood v. Quinby*, 44-385.

An action to enforce the duty imposed on the trustees to make such certificate does not become barred as to a tax already voted until three years after the passage of the act limiting the time for making such certificate. *Ibid.*

The fact that the certificate of the trustees is given at a place outside of

their township will not render it absolutely void. *Meader v. Lowry*, 45–684.

Also, *held*, that the proper trustees to make the certificate were those of township which had voted the tax, although afterward portions of the township were organized into or transferred to another township. *Ibid.*

Proceeds. As to compelling payment to company of proceeds of tax, see notes to § 2083.

Assignment. The claim for a railroad aid tax is assignable. *Merrill v. Welsher*, 50–61.

The assignment of such a tax does not discharge the assignee of the eqities between the company in favor of which the tax was voted and the tax payers, and in a suit by a tax payer to invalidate such a tax because of the nonfulfillment of conditions precedent on the part of the railroad company, the company in whose favor the tax was voted and the assignee of such tax are necessary parties. So, also, the township trustees and the county treasurer are to be made parties defendant. *Sully v. Drennan*, 113 U. S., 287.

Conditions. See notes to § 2083.

2086. Certificate of taxes exchangeable for stock or bonds. 20 G. A., ch. 159, § 6; *23 G. A., ch. 19, § 1. It shall be the duty of the county treasurer, when required, in addition to a tax receipt to issue to each tax payer on the payment of any taxes voted under the provisions of this act a certificate showing the amount of tax so paid, the name of the railroad company entitled thereto, and when the same was paid, and the treasurer shall be entitled to charge and receive the sum of twenty-five cents for each certificate so issued. Said certificates are hereby made assignable and when presented by any person holding the legal title thereto to the president, managing director, treasurer or secretary of the railroad company receiving the taxes paid as shown by such certificate, in amount showing the sum of one hundred dollars or more of taxes to have been paid for said railroad company, said railroad company shall issue or cause to be issued to said person the amount of stock of the company desiring the benefit from said taxes to the amount of said certificate or certificates, and if the taxes paid as shown by said certificate or certificates amount in the aggregate to more or less than any certain number of shares of said stock, then the holder of said certificates shall be entitled to receive the full number of shares of stock covered by said certificates and may make up and tender in money the balance of any share of said stock when the certificates held by him are not equal in amount to one full share of such stock, the stock for such purpose to be estimated at its par value. Whenever it shall be proposed in the petition and notice calling said election to issue first mortgages, bonds, not exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge and not exceeding the sum of eighteen thousand five hundred dollars per mile for the ordinary four feet eight and one-half inch gauge, in lieu of stock as herein provided, it shall be lawful to issue said bonds of the denomination of one hundred dollars in the same manner as is provided

* In this section and the following the words "eighteen thousand five hundred" were substituted for "sixteeen thousand" by chapter nineteen of the acts of the twenty-third general assembly, entitled "an act to amend sections six and seven of chapter one hundred fifty-nine of the laws of the twentieth general assembly of Iowa in relation to taxes in aid of railroads," which took effect by publication March 23, 1890.

for the issue of stock, and in such case the petition and notice shall state the amount of bonds per mile to be issued, the rate of interest, and the time of payment of the interest and principal of said bonds.

If the company to which a tax has been voted transfers its property and franchises so that the tax payer cannot secure the stock to which he is entitled, the collection of the tax cannot be enforced. The tax payer cannot be compelled to take stock in another corporation, even though more valuable. *Manning v. Matthews*, 66-675; *Blunt v. Carpenter*, 68-265.

The tax payer must be held to a knowledge of the law at tbe time the tax was voted, by which (see § 1997) the company has the right to transfer the road, and therefore the obligation of payment by tax payers will depend upon the readiness of the purchasing company to deliver the stock, where there is a condition in the contract of transfer by which stock in the consolidated line of equal or greater value than that in the company in whose favor the tax is voted, is to be issued. *Contillon v. Dubuque & N. W. R. Co.*, 78-48.

2078. Liability of directors. 20 G. A., ch. 159, § 7; 23 G. A., ch. 19, § 2. The board of directors of any railroad company receiving taxes voted in aid thereof under the provisions of this act, or those members thereof or either of them who shall vote to bond, mortgage, or in any manner incumber said road to an amount exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge, or exceeding the sum of eighteen thousand five hundred dollars per mile for the ordinary four feet eight and one-half inch guage, not including in either case any debt for ordinary operating expenses, shall be liable to the stockholders or either of them for double the amount estimated of its par value of the stock by him or her held, if the same should be rendered of less value or loss thereby.

2088. Forfeiture of tax. 20 G. A., ch. 159, § 8. Should the taxes voted in aid of any railroad under the provisions of this act remain in the county treasury for more than one year after the same have been collected, the right to them by the railroad company shall be considered forfeited, and the persons who paid the said taxes shall be entitled to receive back from the county treasurer their pro rata shares thereof remaining, and in all such cases where any taxes have been voted or levied upon the real or personal property in any township, city or town in any county in this state to aid in the construction of any railroad as hereinbefore provided, and the railroad in aid of which said taxes were voted or levied has not been built or completed or operated into or through such township, city or town, it shall be the duty of the board of supervisors of the county where said taxes have been voted and levied and still remain on the tax books, to give the railroad company to which the tax was voted at least thirty days' notice in writing, to be served like original notices, of their intention to abate and cancel such taxes, and thereupon to cause the same to be canceled and stricken from the tax books of the county, which cancellation shall remove all liens created by the levy of said taxes; but the foregoing provisions shall in no manner affect any actions which may now be pending for the recovery of any taxes heretofore voted in aid of any railroads; and in all cases where the railroad company to whom any taxes may have been or may hereafter be voted, neglects or refuses to receive such taxes or to require or permit the same to be collected and certificates therefor to be issued for the period of one year after such taxes become due and collectible, and in all cases where any taxes have been heretofore voted in

aid of any railroad and the conditions upon which the same were voted have not in fact been complied with and the time in which said conditions were to be fulfilled has expired, all such taxes are hereby declared forfeited and canceled and the county officers of the county in which any such taxes shall have been levied and entered upon the tax books shall enter cancellation thereof upon the proper county records; and in all cases where any taxes to aid in the construction of any railroad may hereafter be voted upon the inducement or promise offered on the part of said railroad company, or any duly authorized agent thereof, for any rebate or exemption from said tax or part thereof, or any agreed price to be paid for the stock that may be issued in lieu of said tax, or a division of said tax or any portion or percentage thereof, with any of the voters or tax payers as an inducement to procure said tax to be voted, all such taxes so procured to be voted are and shall be absolutely void.

The fact that a portion of the tax voted in aid of the railroad has been paid, and, after having lain in the treasury two years uncalled for, has been refunded to the tax payer as provided by statute, does not operate as a forfeiture of taxes not so paid. *Merrill v. Welsher*, 50–61.

Where the road has been completed and there has been a continuing demand of taxes received by the treasurer, the right to recover taxes received will not be defeated by the fact that they have remained in the treasury more than two years. The provision was intended to secure the speedy and prompt building of the road. *Merrill v. Marshall County*, 74–24.

Under a former statute, *held*, that the county had no interest in the tax collected; that it was to be paid to the county treasurer, and in proper case should be refunded by him without any warrant or order of the board of supervisors; that in case of misappropriation by the county treasurer the loss would not fall upon the county, and that the claim of plaintiff for the refunding of his proportion of the tax forfeited was strictly against the fund, and not against the county. *Barnes v. Marshall County*, 56–20.

In regard to undue influence and also failure to comply with conditions, see notes to § 2083.

2089. Taxes paid in labor or supplies. 20 G. A., ch. 159, § 9. Nothing contained in this act shall preclude any tax payer who may contract with a railroad company for which taxes shall have been or may hereafter be voted under the provisions of this act, to pay his tax thus voted or any part thereof in labor upon the line of said railroad, or in material for its construction, or supplies furnished or money paid for the construction of the road in pursuance of the terms and conditions stipulated in the notices of election in lieu of a payment to the county treasurer. Upon presenting to the county treasurer a receipt from said railroad company or its duly authorized agent specifying the amount of such payment, the same shall be credited by the county treasurer on his tax in aid of said railroad, with the effect in all respects as though the same was paid in money to the said county treasurer; and when such receipts have been presented and thus credited by the county treasurer they shall have the same force and validity in his settlement with the board of supervisors as the orders from the railroad company provided for in section four [five] of this act [§ 2085]; and *provided*, laborers shall have lien upon said tax so voted in aid of a railroad company for the amount due them for labor performed in the construction of said railroad.

Where the company issued to a tax payer a receipt for taxes paid directly to the company, to be presented to the county treasurer in payment of the

taxes, *held*, that such receipts were in the nature of advance receipts for the taxes, and that no action thereon against the company or the assignor of such instrument could be maintained thereon, at least until demand has been made on the treasurer that they be received for taxes. *Lisle v. Iowa, M. & N. P. R. Co.*, 54-499.

UNION DEPOTS.

2090. Corporations formed. 20 G. A., ch. 139, § 1. In order to facilitate the public convenience and safety in the transmission of freight and passengers from one railway to another and to prevent unnecessary expense and inconvenience attending the accumulation of a number of stations in one place, authority is hereby given to any number of persons or any number of railway corporations or both persons and railway corporations to form themselves into a body corporate under the general incorporation laws of this state relating to corporations for pecuniary profit for the purpose of acquiring, establishing, constructing and maintaining at any place in this state union station-houses or depots for freight or passengers, or for both, with necessary offices for express, baggage and postal rooms in the same or separate buildings, railroad *tracts* [tracks] and other appurtenances of such depots. And for that purpose may make and file for record articles of association in the manner provided for such corporations in this state, and any railroad company operating a road in this state or interested in the operation of a road in this state, whether organized under the laws of this state or elsewhere, may become stockholder in such corporation in the same manner an individual might. Such articles may provide for the business of the corporation being conducted under by-laws to be adopted by the stockholders in which case a copy of such by-laws shall be posted in the passenger or waitiug rooms of the depot and in the office of the company.

2091. Powers. 20 G. A., ch. 139, § 2. Every corporation formed under the provisions of this act shall have power to take and hold for the purposes mentioned in section one [§ 2090], such real estate as may be deemed necessary by the railroad commissioners for the location, erection and construction of their depot and its approaches, which they may acquire by purchase or by condemnation as provided by chapter four, title ten, code of Iowa, 1873, and when condemned and paid for as thereby provided, such real estate shall belong to the corporation.

2092. Connecting tracks. 20 G. A., ch. 139, § 3. Such corporation, with the consent of the city council of any city or town in this state in which said depot is located, shall have the right to lay its tracks to make necessary connection with all railways desiring to use such depot upon the streets or alleys of said city, and by and with the consent of such city council may erect such depot upon or across any such street or alley, but no railroad track can thus be located, nor can such depot be so erected until after due injury to property abutting upon the streets or alleys upon which such railway track is proposed to be located or such depot is proposed to be erected, has been ascertained and compensation made in the manner provided for taking private property for works of internal improvement in chapter four of title ten of the code, subject to the provisions of section four hundred and sixty-four of the code [§ 623].

2093. Liability for damages. 20 G. A., ch. 139, § 4. Nothing in this act contained, or in the articles of incorporation or by-laws, of the corporation herein provided for, shall in any manner release the railroad companies using such union depots, tracks or appurtenances from the same liability for all damages by injuries to persons, stock, baggage or freight, or for the loss of baggage or freight, in or about said union depot grounds, as if said depot, tracks and appurtenances wholly belonged to and were operated by said railroad companies using the same.

STATION-HOUSES AT INTERSECTIONS.

2094. Railroads to maintain. 20 G. A., ch. 24, § 1. All railroad corporations shall at all points of connection, crossing or intersection with the roads of other corporations, unite with such corporations in establishing and maintaining suitable platforms and station-houses for the convenience of passengers desiring to transfer from one road to the other, and for the transfer of passengers, baggage or freight, whenever the same shall be ordered by the railroad commission; and such corporation shall, when so ordered by the railroad commission, keep such depot or passenger-house warmed, lighted and open to the ingress and egress of all passengers a reasonable time before the arrival and until after the departure of all trains carrying passengers on said railroad or railroads; and said railroad companies so connecting, crossing, or intersecting, shall stop all trains at said depots at said connections, crossings or intersections, for the transfer of passengers, baggage and freight, when so ordered by the railroad commission, and the expense of constructing and maintaining such station-house and platform shall be paid by such corporations in such proportions as may be fixed by the order of the railroad commission. Such corporations, connecting or intersecting as aforesaid, shall also, whenever ordered by the railroad commission, so unite and connect the tracks of said several corporations as to permit the transfer from the track of one corporation to the other of loaded or unloaded cars designed for transportation upon both roads.

2095. Penalty. 20 G. A., ch. 24, § 2. Any railroad corporation or company which, after having received ninety days' notice by the railroad commissioners, shall neglect or refuse to comply with the provisions of section one of this act [§ 2094], shall, for every day such corporations or company fails, neglects or refuses to comply therewith, forfeit and pay the sum of twenty-five dollars, which may be recovered in the name of the state of Iowa, for the use of the school fund of the county wherein such crossing or intersection is situated, and it shall be the duty of the prosecuting [county] attorney of the proper judicial district [county] to prosecute for and the recover of same.

CHANGING NAMES OF STATIONS.

2096. By railroad commissioners. 22 G. A. ch. 31, § 1. In all cases where any railway company shall fail or refuse to make the name of a railway station conform to the name of the incorporated town within the limits of which it is situated, the railway commissioners of the state, upon hearing and after notice thereof may order a change in the name of the said station to effect such uniformity in name, said notice may be served upon the same

persons and in the same manner as provided for service upon said railway company of original notice, at least ten days before the date named for hearing.

2097. Notice. 22 G. A., ch. 31, § 2. When the railway commissioners shall order a change in the name of a railway station in pursuance of the provisions of section one of this act [§ 2096], said commission shall give the company upon whose line the said station is located, notice of such order, and if the said order be not complied with, within thirty days from the date of service of such notice, it shall be the duty of the said commissioners to notify the attorney-general of the facts in the case, who upon such notice shall proceed in the courts of the state to compel the enforcement of said order.

2098. Penalty. 22 G. A., ch. 31, § 3. A failure to comply with the order of the railway commissioners within thirty days from service of such notice, shall constitute a misdemeanor for which said railway company shall be subject to a fine of one thousand dollars and non-compliance for each thirty days thereafter shall constitute a separate and distinct offense subject to a fine of one thousand dollars.

REGULATIONS AS TO OFFICES.

CHAPTER 26 of the ACTS OF THE TWENTY-FOURTH GENERAL ASSEMBLY.

CHANGE OF NAME OF RAILWAY STATIONS.

AN ACT to amend Chapter 31 of the Acts of the Twenty-second General Assembly relative to change of name of railway stations.

SECTION 1. That chapter 31 of the laws of the twenty-second general assembly be amended as follows, to-wit: By inserting after the word "town," in the third line of section 1 of said chapter 31, the following words, to-wit: "Or unincorporated town regularly laid out and platted."

Approved April 6, 1892.

REGULATIONS AS TO SLEEPING CARS.

2101. Office kept open. 18 G. A., ch. 169, § 1. All railroad and sleeping-car companies running or operating sleepers or sleeping-cars within this state, upon railroads terminating therein, shall establish, maintain and keep open to the public at such termini, ticket offices at accessible and convenient places in which they shall keep a diagram of the berths, and state-rooms in such sleepers or sleeping cars, and shall at all times during the day-time keep such offices open for the sale of tickets for such berths and state-rooms.

2102. Penalty. 18 G. A., ch. 169, § 2. If any officer, agent, employee, or lessee, engaged in operating any sleeper or sleeping-car line, termininating or operated within the state of Iowa, shall refuse or neglect to comply with any of the provisions or requirements of section one of this act [§ 2101] he shall be deemed guilty of a misdemeanor, and upon conviction thereof

shall be fined in a sum not exceeding five hundred dollars and may be imprisoned not more than six months.

TRANSPORTATION OF INTOXICATING LIQUORS.

2410. Certificate for. 1553; 20 G. A., ch. 143, § 14; 21 G. A., ch., 66, § 10; 22 G. A., ch. 73, § 6. If any express company, railway company, or an agent or person in the employ of any express company, or of any commo carrier, or any person in the employ of any common carrier, or if any oth person shall transport or convey between points, or from one place to a other within this state, for any other person or persons or corporation, a intoxicating liquors, without first having been furnished with a certifica from and under the seal of the county auditor of the county to which sa liquor is to be transported or is consigned for transportation, or within whi it is to be conveyed from place to place, certifying that the consignee or pe son to whom said liquor is to be transported, conveyed or delivered, authorized to sell such intoxicating liquors in such county, such compan corporation, or person so offending, and each of them, and any agent of suc company, corporation or person so offending, shall, upon conviction there be fined in the sum of one hundred dollars for each offense and pay costs prosecution and the cost shall include a reasonable attorney fee to be assesse by the court, which shall be paid into the county fund, and stand committe to the county jail until such fine and costs of prosecution are paid. The offense herein defined shall be held to be complete and shall be held to have been committed in any county of the state, through or to which said intoxicating liquors are transported, or in which the same is unloaded for transportation or in which said liquors are conveyed from place to place or delivered. It shall be the duty of the several county auditors of this state, to issue the certificate herein contemplated, to any person having such permit and the certificate so issued shall be truly dated when issued, and shall specify the date at which the permit expires as shown by the county records. *Provided* however that the defendant may show as a defense hereunder by preponderance of evidence that the character and circumstances of the shipment and its contents were unknown to him. [R., § 1580.]

This section, as now amended, is unconstitutional so far as it relates to bringing liquor into the state, as being in conflict with the provisions of the United States constitution granting to congress the power to regulate commerce among the several states. *Bowman v. Chicago & N. W. R. Co.*, 125 U. S., 465.

The right to bring liquor into the state in pursuance of interstate commerce, involves also the right to sell the same in original packages. *Leisy v. Hardin*, 135 U. S., 100. But this decision does not render the whole statute void. Therefore, since the enactment of the "Wilson Bill" liquor brought into the state comes under the operation of the state statute. *In re Spickler*, 43 Fed. Rep., 653.

Where liquor was consigned to a seller from without the state in small packages and reached its destination from six to fifteen days prior to its seizure, and was during that time kept in the railroad freight house from which the consignee, a frequent violator of the law in regard to the selling of intoxicating liquors, was in the habit of receiving the packages and paying for them one at a time, *held* that the liquor was not exempt from seizure under the decision of the Supreme Court of the United States in the Bowman case above cited. *State v. Creeden*, 78-556.

The statute does not forbid the transportation of liquors out of the state,

but it does forbid the manufacture of liquors for purposes other than for sale according to the provisions of the statute. This construction does not render the statute unconstitutional as an interference with interstate commerce. *Pearson v. International Distillery*, 72–348.

"Any other person," within the language of this section, includes the employe of one who is regularly engaged in the business of transporting and delivering for hire intoxicating liquors for one who sells the same. *State v. Campbell*, 76–122.

2411. False statements. 21 G. A., ch. 66, § 11. If any person for the purpose of procuring the shipment, transportation, or conveyance of any intoxicating liquors from point to point or from one place to another within this state, shall make to any company, corporation or common carrier, or to any agent of such company, corporation or common carrier, or other person, any false statement as to the character or contents of any box, barrel or other vessel or package containing such liquors, or shall refuse to give correct and truthful information as to the contents of any such box, barrel, or other vessel or package so sought to be transported or conveyed; or shall falsely mark, brand or label such box, barrel or other vessel or package, in order to conceal the fact that the same contains intoxicating liquors for the purpose aforesaid; or shall by any device or concealment procure or attempt to procure the conveyance or transportation of such liquors as herein prohibited, he shall upon conviction, be fined for each offense one hundred dollars, and costs of prosecution, and the costs shall include a reasonable attorney fee to be assessed by the court, which shall be paid into the county fund, and be committed to the county jail until such fine and costs are paid. Any peace officer of the county under process or warrant to him directed shall have the right to open any box, barrel, or other vessel or package, for examination if he has reasonable ground for believing that it contains intoxicating liquors, either before or while the same is being so transported or conveyed.

2412. Packages labeled. 22 G. A., ch. 73, § 7. It shall be unlawful for any common carrier or other person, to transport or convey by any means, from point to point or from one place to another within this state, any intoxicating liquor, unless the vessel, or other package containing such liquors, shall be plainly and correctly labeled or marked, showing the quantity and kind of liquor contained therein, as well as the name of the party to whom it is to be delivered. And no person shall be authorized to receive or keep such liquors unless the same be marked or labeled as herein required. The violation of any provision in this section, by any common carrier or any agent, or employee of such carrier or by any other person, shall be punished the same as provided in section fifteen hundred and fifty-three, as substituted and enacted in section ten, chapter sixty-six, acts of twenty-first general assembly [§ 2410], for the violation of the provisions of that section. And liquors conveyed or transported, or delivered without being marked or labeled as herein required, whether in the hands of the carrier or some one to whom it shall have been delivered shall be subject to seizure and condemnation as liquor kept for illegal sale.

RECORDING LAND-GRANT TITLES.

3119. By railroads. 18 G. A., ch. 186, § 1. Each and every railroad company which owns or claims to own lands in the state of Iowa granted by the government of the United States or the state of Iowa, to aid in the construction of its railroad, where it has not already done so, shall place on file and cause the same to be recorded within three months after the taking effect of this act, in each county wherein the land[s] so granted are situated, evidence of its title or claim of title, whether the same shall consist of patents from the United States, or certificates from the secretary of the interior or governor of the state of Iowa, or the proper land office of the United States or state of Iowa. Where no patent was issued, reference shall be made in said certificate to the act or acts of congress, and the acts of the legislature of the state of Iowa granting such lands, giving the date of said acts, and date of their approval, under which claim of title is made; *provided,* that where the certificate of the secretary of the interior or the patents, as the case may be, contain lands situated in more than one county, *that* the register of the state land office shall, upon the application of any railroad company or grantee, prepare and furnish to be recorded, as aforesaid, a list of all the lands situated in any one county, so granted, patented or certified, and when so recorded said records, or a duly authenticated copy thereof may be introduced in any court as evidence as provided in section three thousand seven hundred and two of the code [§ 4953].

3120. Duty of recorder. 18 G. A., ch. 186, § 2. Such evidence of title shall be filed with the recorder of deeds of the county in which the lands are situated, and it shall be the duty of the recorder to record the same and shall place an abstract thereof upon the index of deeds so as to show the evidence of title, and the evidence thereof shall be constructive notice to all persons as provided in other cases of entries upon said index, and the recorder shall receive same fees as for recording other instruments.

MECHANICS' LIENS.

3313 Extent of lien on work of internal improvement. 16 G. A., ch. 100, § 5. And when such material shall have been furnished or labor performed, in the construction, repair, or equipment of any railroad, canal, viaduct, or other similar improvement, the lien therefor shall extend and attach to the erection, excavations, embankments, bridges, road-bed, and all land upon which the same may be situated, including the rolling stock thereto appertaining and belonging; all of which, except the easement or right of way, shall constitute the building, erection or improvement provided and mentioned in this statute.

Before the enactment of this provision as to rolling stock it was held that a mechanic's lien did not attach to such property. *Neilson v. Iowa Eastern R. Co.*, 51–184; *S. C.*, 51–714.

A laborer employed for days' wages in the construction of a railroad is entitled to a lien on the road for such wages. *Morman v. Carroll*, 35–22.

A subcontractor under a subcontractor is also entitled to a lien. *Mears v. Stubbs*, 45–675.

Where a railroad is a unit in every respect except in its construction, a subcontractor who builds only a part of the road has nevertheless a right to a lien on the whole road. *Brooks v. Railway Co.*, 101 U. S., 443.

A creditor is not entitled to a lien for money paid out for the use of a debtor, although embraced in the same account with charges for services rendered. *Stubbs v. Clarinda, C. S. & S. W. R. Co.*, 65–513.

LIEN ON GOODS FOR CHARGES—SALE.

3364. In what cases. 2177. Personal property transported by, or stored or left with any warehouseman, forwarding and commission merchant, or other depository, express company, or carriers, shall be subject to a lien for the just and lawful charges on the same, and for the transportation, advances and storage thereof. [13 G. A., ch. 178, § 1.]

3365. Unclaimed goods. 2178. If any such property shall for six months remain in the possession, unclaimed, of any of the persons named in the preceding section, with the just and legal charges unpaid thereon, the person having the same in charge or possession shall first give notice to the owner or consignee, if his whereabouts is known, and if not known, shall go before the nearest justice of the peace and make affidavit, stating the time and place where such property was received, the marks or brands by which the same is designated, if any, and, if not, then such other descriptions as may best answer the purpose of indicating what the property is, and shall also state the probable value of the same, and to whom consigned; also the charges paid thereon, accompanied by the original receipt for such charges and by the bill of lading, also the other charges, if any, due and unpaid, and whether the whereabouts of the owner or consignee of such goods is known to the affiant, and if so, whether notice was first given to him as hereinbefore provided; which affidavit shall be filed by the said justice of the peace in his office, for the inspection of any one interested in the same, and he shall also enter in his estray book a statement of the contents of the affidavit, and time and place where and by whom the same was made. [Same, § 2.]

3366. Sale; notice. 2179. If such property still remain unclaimed, and the charges are not paid thereon, then the person in possession of the same, either by himself or his agent, where the probable value does not exceed one hundred dollars, shall advertise the same for sale for the period of fourteen days, by posting five notices in five of the most public places in the city or locality where said property is held, giving such description as will indicate what is to be sold; but when the goods exceed the probable value of one hundred dollars, then the length of notice shall be four weeks, and in addition to the five notices posted, there shall be a publication of the notice of sale for the same length of time in some newspaper of general circulation in the locality where the property is held, if there be one, and if not, then the next nearest newspaper published in that neighborhood, at the end of which period, if the property is still unclaimed, or charges unpaid, the agent or party in charge shall sell the same at public auction, between the hours of ten o'clock A. M. and four o'clock P. M., for the highest price the same will bring in cash, which sale may be continued from day to day by public announcement to that effect at the time of adjournment until all the property is sold, and from the proceeds of such sale, the said party who held the same shall take and appropriate a sufficient sum to pay all charges thereon, and all costs and expenses of sale; the cost of advertising to be no more than in the case of a constable or sheriff's sale, and the same to be conducted in a similar manner. [Same, § 3.]

3367. Sale of perishable goods. 2180. Fruit, fresh fish, oysters, game, and other perishable property, shall be retained twenty-four hours, and if not claimed within that time and charges paid, after the proper affidavit is made as required by section twenty-one hundred and seventy-eight of this chapter [§ 3365], may be sold either at public or private sale, in the discretion of the party holding the property, for the highest price that the same will bring, and the proceeds of the sale disposed of as above provided. But in both cases, if the owner or consignee of said unclaimed property shall reside in the same city, town or locality in which the same shall be, and shall be known to the agent or party having the same in charge, then personal notice shall be given to said owner or consignee, in writing, that said goods are held subject to his order, on payment of charges, and that unless he pays said charges, and removes the property, the same will be sold as provided by law. [Same, § 4.]

3368. Disposition of proceeds. 2181. After the charges due and unpaid on the property, and the expenses and costs of sale have been taken out of the proceeds, the excess in the hands of the agent or person who was in charge thereof, shall be by him forthwith deposited with the county treasurer of the county where the goods were sold, subject to the order of the owner, said ownership being properly authenticated under oath, and such person shall take from such treasurer a receipt for such money, and deposit the same with the county auditor. He shall also file with the county treasurer a schedule of the property, with the name of the consignee or owner, if known, of each piece of property sold, the sum realized from the sale of each separate package, describing the same, together with a copy of the advertisement as hereinbefore provided, and a full statement of the receipts of the sale, and the amount disbursed to pay charges, costs, and expenses of sale, all of which shall be under the oath of the party or his agent, which schedule, statement, oath, and advertisement shall all be filed and preserved in the treasurer's office, for the inspection of any one interested in the same. [Same, § 5.]

3369. Duty of treasurer. 2182. Should the owner of the property sold not make a demand upon the county treasurer for any money that may be in the treasury to his credit, according to the provisions of this chapter, the sum so unclaimed shall be accounted for by the county treasurer, and placed to the credit of the county in the next subsequent settlement made by the treasurer with the county; and should the money, or any part thereof, remain unclaimed during the period of one year, it shall then be paid into the school fund, to be distributed as other funds may be by law, which may be raised by tax on other property of the county. But nothing herein contained shall be a bar to any legal claimant from prosecuting and proving his claim for such money at any time within ten years, and, the claim being within that period prosecuted and proved, it shall be paid out of the county treasury in which it was originally placed without interest. [Same, § 6.]

LIABILITY AS COMMON CARRIERS.

3370. For damages to baggage. 2183. The proprietors of all omnibuses, transfer companies, or other common carriers, doing business within the limits of this state, and their agents, shall be liable for damages occa-

sioned to baggage or other property belonging to travelers, through carelessness or negligent handling while in possession of said companies or carriers. And in addition to the damages recoverable therefor, the parties recovering the same shall also be entitled to an allowance of not less than five dollars for every day's detention caused thereby or by a suit brought to recover the same. [13 G. A., ch. 165.]

This section gives a remedy for damages to baggage, and for detention caused thereby. It does not authorize a recovery on account of detention of baggage or failure to deliver the same, nor for detention of the traveler unless it be on account of damages done to baggage. *Anderson v. Toledo, W. & W. R. Co.*, 32-86.

3371. Cannot limit liability. 2184. No contract, receipt, rule, or regulation shall exempt any corporation or person engaged in transporting persons for hire from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made and entered into. [11 G. A., ch. 113.]

See, also, § 2007, applicable to railroads.

PLACE OF BRINGING ACTION AGAINST.

3787. In county through which line passes. 2582. Actions may be brought against railway corporations, the owners of mail stages, or other line of coaches or cars, including express companies, car companies, telegraph and canal companies, and the lessees, companies or persons operating the same, in any county through which the line or road thereof passes, or is operated. [9 G. A., ch. 169, § 8; 12 G. A., ch. 172, § 2; 14 G. A., ch. 95, § 1.]

A railway company has a residence in any county through which its road passes and in which it transacts business. *Baldwin v. Mississippi & M. R. Co.*, 5-518; *Richardson v. Burlington & M. R. R. Co.*, 8-260.

A railway company doing business in the state, so that action might be commenced against it as here provided cannot claim advantage of the provisions of the statute of limitations as to non-residents. See notes to § 3738.

An action against a foreign railway corporation not operating a line of railway nor having any office in the state cannot be brought in the state on a cause of action arising out of business not transacted within the state by means of service of notice on an agent found within the state. *Elgin Canning Co. v. Atchison, T. & S. F. R. Co.*, 24 Fed. Rep., 866.

Bringing cars within the state with a patent air brake for purposes of exhibition does not authorize service upon the foreign corporation owning such cars. *Carpenter v. Westinghouse Air Brake Co.*, 32 Fed. Rep., 434.

Corporations operating railways within the state are subject to the jurisdiction of our courts the same as any person resident within the state. *Mooney v. Union Pacific R. Co.*, 60-346.

The provisions as to telegraph companies is applicable to telephone companies, and authorizes the bringing of action against such a company before a justice of the peace in any county through which the line of the company passes or is operated. *Franklin v. Northwestern Telephone Co.*, 69-97.

This section is not restrictive, but designed to give additional facilities for bringing action against the parties named therein. It is not intended that property of non-resident corporations shall be exempt from judicial process in any case where property of other non-resident debtors could be taken. *Weyand v. Atchison, T. & S. F.*, 75-573.

3788. Construction companies. 2583. An action may be brought

against any corporation, company, or person, engaged in the construction of a railway, telegraph line, or canal, on any contract relating thereto, or to any part thereof, or for damages in any manner growing out of the work thereon, in any county where such contract was made, or performed in whole or in part, or where the work was done out of which arose the damage claimed. [14 G. A., ch. 95, § 1.]

Under this section, *held*, that where an action was brought by a subcontractor entitled to a mechanic's lien against the contractor for the construction of a railway on an agreement to pay the amount of such lien, such action was properly brought in the county through which the road was being constructed, and could not be removed, on the application of defendant, to the county of his residence. *Vaughn v. Smith*, 58–553.

The facts showing that the contract has been performed or the work done in the county in which suit is brought may be established by affidavit on the hearing of the motion, if defendant seeks to change the place of trial to the county of his residence. *Jordan v. Kavanaugh*, 63–152.

On motion for change of venue the question as to plaintiff's right of recovery against a portion of defendants cannot be raised, as such a question must be determined upon demurrer. *Ibid.*

3790. In county of office or agency. 2585. When a corporation, company, or individual, has an office or agency in any county for the transaction of business, any suits growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located. [R., § 2801; C., '51, § 1705.]

These provisions are permissive and not mandatory, and the suit, if against a non-resident, may be brought in the usual manner of commencing actions against non-residents. *Dean v. White*, 5–266.

This section merely fixes the county in which suit shall be brought; it does not define the manner in which jurisdiction over the person is to be acquired. *Centennial Mut. L. Ass'n v. Walker*, 50–75.

One who accepts the benefits of a sale by a person claiming to act as his agent, or who accepts the benefits of a proposition made through and forwarded by him, thereby ratifies the transaction, so that an action arising therefrom may be brought in the county of such agency. *Milligan v. Davis*, 49–126.

A certain method of doing business between a firm and defendant, *held* such as to constitute the firm agents for defendant, and authorize an action against defendant growing out of the business of such agency to be brought in the county where the agency was located. *Ibid.*

An action by the agent against the principal for services as agent is connected with the business of the agency in such sense that suit against the principal may be brought in the county of such agency. *Ockerson v. Burnham*, 63–570.

The section does not limit the right to commence a suit in the county where the agency is located to the time during which the agency exists. *Ibid.*

This provision is also applicable to suits against a partnership brought in a justice's court, and the partnership may be considered a resident of the county in which the business is transacted although none of its members are residents of such county. *Fitzgerald v. Grimmell*, 64–261.

The office or agency referred to is one established for the purpose of carrying on the business for which the corporation is organized. A foreign corporation does not subject itself to suit here by sending here an agent to advertise, make contracts, etc. *Carpenter v. Westinghouse Air Brake Co.*, 32 Fed. Rep., 434.

An attachment against a foreign railway corporation may be made in a

court of this state, acquiring jurisdiction by attachment against the property of such corporation within this state. *Weyand v. Atchison, T. & S. F.*, 75–573.

SERVICE OF NOTICE OF ACTION.

3816. On agent. 2611. If the action is against any corporation, or person owning or operating any railway, telegraph line, canal, stages, coaches, or cars, or any express company, service may be made upon any general agent of such corporation, or person, wherever found, or upon any station, ticket, or other agent of such corporation, or person transacting the business thereof in the county where the suit is brought; if there is no such agent in said county, then service may be had upon an agent thereof transacting said business in any other county. [C., '51, § 1727; 14 G. A., ch. 95, § 4.]

Service upon the trackmaster of a railroad, *held* not sufficient to constitute service upon the company. *Richardson v. Burlington & M. R. R. Co.*, 8–260.

A railway corporation not operating a line of railway within the state, and not having any office or agency within the state, out of the business of which the cause of the action arises, is not within the jurisdiction of the state or federal courts of Iowa, and a service upon one of its agents who may be found within the state will not confer jurisdiction. *Elgin Canning Co. v. Atchinson, etc., R. Co.*, 24 Fed. Rep., 866.

A foreign corporation doing business in the state in such way that it may be served with notice under statutory provisions cannot be deemed a non-resident in such sense that the statute of limitations will not run in its favor. *Wall v. Chicago & N. W. R. Co.*, 69–498.

INJUNCTION.

4627. To stop operation; notice. 3391. An injunction to stop the general and ordinry business of a corporation, or the operations of a railway, or of a municipal corporation, or the erection of any building or other work, or the board of supervisors of any county, or to restrain a nuisance, can only be granted upon reasonable notice of the time and place of the application to the party to be enjoined.

Section applied. *District T'p v. Barrett*, 47–110.

This section *held* not applicable where one district township sought to restrain another from removing school-houses from the territory of the former. *District T'p v. District T'p*, 54–115.

INTERFERENCE WITH OPERATION OF TRAINS.

5202. Shooting or throwing at train. 16 G. A., ch. 148, § 1. If any person shall throw any stone, or other substance of any nature whatever, or shall present or discharge any gun, pistol, or other fire-arm at any railroad train, car, or locomotive engine he shall be deemed guilty of a misdemeanor and be punished accordingly.

5203. Jumping upon or off cars in motion. 16 G. A., ch. 148, § 2. If any person not employed thereon, or not an officer of the law in the discharge of his duty, without the consent of the person having the same in charge, shall get upon, or off, any locomotive engine, or car of any railroad company while said engine or car is in motion, or elsewhere than the established depots of such company, or who shall get upon, cling to, or otherwise attach himself to any such engine or car, for the purpose of riding upon the

same, intending to jump therefrom, when such engine or car is in motion, he shall be guilty of a misdemeanor and be punished by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days.

Where the recovery for injury received while getting off of a train while in motion is sought to be defeated on the ground that such act was unlawful and constituted contributory negligence, plaintiff may, under allegation of freedom from contributory negligence, prove that the act was with the consent of the conductor. *Ruben v. Central Iowa R. Co.*, 74–732.

It being a misdemeanor by this section for a person jump to from a train while in motion, such act would defeat recovery for injuries received thereby, unless the act was done by the direction of the conductor. *Herman v. Chicago, M. & St. P. R. Co.*, 78–161.

5204. Uncoupling locomotive or cars. 19 G. A., ch. 112, § 1. If any person shall wilfully and maliciously uncouple or detach the locomotive or tender or any of the cars of any railroad train, or shall in any manner aid, abet, or procure the doing of the same, such person shall be punished by imprisonment in the state penitentiory not exceeding five years, or by fine not exceeding one thousand dollars, or both, at the discretion of the court.

5205. Seizing and running locomotive. 19 G. A., ch. 112, § 2. If any person shall unlawfully seize upon any locomotive, with or without any express, mail, baggage, or other car attached thereto, and run the same upon any railroad, or shall aid, abet or procure the doing of the same, such person shall be punished by imprisonment in the state penitentiary not exceeding ten years, or by fine not exceeding two thousand dollars, or both at the discretion of the court.

5206. Wrongfully taking or running hand-car. 19 G. A., ch. 112, § 3. If any person shall, without permission from the proper authority, wrongfully take or run any hand car upon any railroad in this state, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not more than one hundred dollars, or imprisoned not more than thirty days, at the discretion of the court: *Provided*, that if by such unlawful use of any hand-car any locomotive or car is thrown from the track, or a collision produced, or any person injured thereby, he shall, on conviction, be imprisoned in the penitentiary for a term of not more than five years; and *provided further*, that if by reason of such unlawful use of any hand-car any person is killed, such person so offending shall be deemed guilty of manslaughter.

5207. Interference with air-brake or bell-rope. 19 G. A., ch. 112, § 4. If any person not an employee upon the railroad shall wrongfully interfere with any automatic air-brake or bell-rope upon any railroad car, or use the same for the purpose of stopping or in any way controlling the movement of the train, [he] shall be subject to the penalty provided in section three of this act [§ 5206] for the unlawful running of a hand-car on any railroad; and any conductor or brakeman on a railroad train shall have power to arrest such person so offending and deliver him to some peace officer on the line of the railroad.

INJURIES TO OR OBSTRUCTION OF ROAD.

5287. How punished. 3979. If any person maliciously injure, remove, or destroy any bridge, rail, or plank road; or place or cause to be placed any obstruction on such bridge or road; or wilfully obstruct or injure any public

road or highway; or maliciously cut, burn, or in any way break down, injure, or destroy any telegraph post, or in any way cut, break, or injure the wires or any apparatus thereto belonging, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year. [R., § 4320; C., '51, § 2680.]

Where a highway is duly laid out, the fact that it is not yet traveled will not prevent the act of obstructing it from being criminal. *Harrow v. State*, 1 G. Gr., 439.

Error in the description of the highway, so long as its identity is not doubtful, will not vitiate a conviction for obstructing it. *Ibid.*

A party obstructing a highway, by fence or otherwise, may be punished under the provisions of § 5470, although the road supervisor might, under other provisions of the statute, rightfully remove the obstruction. *State v. Berry*, 12–58.

Under an indictment for obstructing a "county road," a road established by statute only can be shown. Evidence of a highway by use or prescription is not admissible. *State v. Snyder*, 25–208.

5298. The same. 3990. If any person or persons shall wilfully and maliciously place any obstruction on the track of any railroad in this state, or remove any rail therefrom, or in any other way injure such railroad, or do any other thing thereto, whereby the life of any person is or may be endangered, he or they shall be punished by confinement in the state penitentiary for life, or for any term not less than two years. [R., § 4331.]

It being found that defendant knew the railroad was being used for the purpose of carrying freight and passengers, and intended to place the obstruction on the road, malice will be implied. *State v. Hessenkamp*, 17–25.

The fact that the land where the obstructions were placed on the track belonged to defendant, and the railroad company had no right of way over it, or had violated the covenants of its contract with respect thereto, would be no defense in an action under this section. *Ibid.*

In a prosecution for obstructing the track of a railway, it is not necessary to allege or prove that the obstruction did actually obstruct and hinder trains. *State v. Clemens*, 38–257.

See, also, § 5287 and notes.

CARE OF ANIMALS IN TRANSPORTATION.

5352. Cruelty Prohibited. 4031. If any person torture, torment, deprive of necessary sustenance, cruelly beat, mutilate, cruelly kill, or overdrive any animal; or unnecessarily fail to provide the same with proper food, drink, shelter, or protection from the weather; or cruelly drive or work the same when unfit for labor; or cruelly abandon the same; or carry or cause the same to be carried on any vehicle, or otherwise, in an unnecessarily cruel and inhuman manner, he shall be punished by imprisonment in the county jail not exceeding thirty days, or by fine not exceeding one hundred dollars. [R., § 4358; C., '51, § 2716; 13 G. A., ch. 176, §§ 1, 2.]

5353. Duty to water and feed. 4032. No railway company in this state, in the carrying or transportation of cattle, sheep, swine, or other animals, shall confine the same in cars for a longer period than twenty-eight consecutive hours, unless delayed by storm or other accidental cause, without unloading for rest, water, and feeding, for a period of at least five consecutive hours. In estimating such confinement, the time the animals have

been confined without such rest on connecting railways from which they are received shall be computed, it being the intention of this section to prevent their continuous confinement beyond twenty-eight hours, except upon contingencies hereinbefore stated; and animals unloaded for rest, water, and feeding, under the provisions of this section, shall be properly fed, watered, and sheltered during such rest by the owners or persons in custody thereof, or in case of their default in so doing, then by the railway company transporting them, at the expense of said owners or persons in custody thereof, and said company shall have a lien upon such animals for food, care and custody furnished, and shall not be liable for any detention of such animals authorized by this section. Any railway company, owner or custodian of such animals who shall fail to comply with the provisions of this section, shall, for each and every such offense, be liable for, and forfeit and pay a penalty of not less than one hundred and not greater than five hundred dollars. But when such animals shall be carried in cars in which they shall and do have proper food, water, space, and opportunity for rest, the foregoing provisions in regard to their being unloaded, shall not apply. [13 G. A., ch. 176, § 3.]

TRANSPORTATION OF GAME UNLAWFULLY KILLED.

5392. When killing prohibited. 17 G. A., ch. 156, § 2; 18 G. A., ch. 193; 20 G. A., ch. 67. It shall be unlawful for any person within the state to shoot or kill any pinnated grouse or prairie chicken, between the first day of December and the first day of September next following; any woodcock, between the first day of January and the tenth day of July; any ruffed grouse or pheasant, wild turkey or quail, between the first day of January and the first day of October; any wild duck, goose, or brant, between the first day of May and the fifteenth day of August; or any wild deer, elk or fawn, between the first day of January and the first day of September.

5396. Shipping out of State. 17 G. A., ch. 156, § 6. It shall be unlawful for any person, company, or corporation at any time to ship, take, or carry out of this state any of the birds or animals named in section two of this act [§ 5392]; but it shall be lawful for any person to ship to any person within this state, any game birds named in said section two, not to exceed one dozen in number in any one day, during the period when by this act the killing of such birds is not prohibited: *Provided*, he shall first make an affidavit before some person authorized to administer oaths, that said birds have not been unlawfully killed, bought, sold, or had in possession, are not being shipped for sale or profit, giving the name and postoffice address of the person to whom shipped, and the number of birds to be so shipped. A copy of such affidavit, indorsed, "A true copy of the original," by the person administering the oath, shall be furnished by him to the affiant, who shall deliver the same to the railroad agent or common carrier receiving such birds for transfortation, and the same shall operate as a release to such carrier or agent from any liability in the shipment or carrying of such birds. The original affidavit shall be retained by the officer taking the same, and may be used as evidence in any prosecution for violation of this act. Any person swearing falsely to any material fact of said affidavit, shall be guilty of perjury, and punished accordingly.

5398. Penalty against carrier. 17 G. A., ch. 156, § 8. If any railway, express company, or other common carrier, or any of their agents or servants, knowingly receive any of the above mentioned birds or animals for transportation or other purpose, during the periods hereinbefore limited and prohibited, or at any other time except in the manner provided in section six of this act [§ 5396], they shall be punished by a fine of not less than one hundred nor more than three hundred dollars, or by imprisonment in the county jail for thirty days, or by both such fine and imprisonment.

TRANSPORTATION OF DISEASED CATTLE.

5418. Penalty. 4058; 21 G. A., ch. 156, § 2. Any person or persons driving any cattle into this state, or any agent, servant, or employee of any railroad or other corporation who shall carry, transport or ship any cattle into this state, or any railroad company, or other corporation or person who shall carry, ship or deliver any cattle into this state, or the owners, controllers, lessees, or agents or employees of any stock yards, receiving into such stock yards or in any other inclosures for the detention of cattle in transit, or shipment, or reshipment or sale, any cattle brought or shipped in any manner into this state, which at the time they were either driven, brought, shipped, or transported into this state, were in such condition as to infect with or to communicate to other cattle, pleuro-pneumonia, or splenitic or Texas fever, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than three hundred dollars and not more than one thousand dollars, or by both fine and imprisonment in the county jail not exceeding six months, in the discretion of the court. [12 G. A., ch. 185, §§ 1, 3, 4.]

5419. Action for damages. 4059; 21 G. A., ch. 156, § 3. Any person who shall be injured or damaged by any of the acts of the persons named in section four thousand and fifty-eight [§ 5418], and which are prohibited by such section, in addition to the remedy therein provided, may bring an action at law against any such persons, agents, employees or corporations mentioned therein, and recover the actual damages sustained by the person or persons so injured, and neither said criminal proceedings nor said civil action, in any stage of the same be a bar to a conviction or to a recovery in the other. [Same, §§ 2, 4.]

The repeal and re-enactment of this section without a special saving clause did not (under Rep. 759, § 49, subd. 1) release liability for penalties already incurred. *Kemmish v. Ball*, 30 Fed. Rep., 759.

This section is not unconstitutional as an attempted regulation of interstate commerce, nor is it open to the objection that it denies any rights and privileges to citizens of other states. *Kimmish v. Ball*, 129 U. S., 217.

AUTOMATIC COUPLERS AND BRAKE.

Safety couplers on new cars. *23 G. A., ch. 18, § 1. It shall be unlawful for any corporation, company or person operating any line of railroad in

*The title of this act is "An act requiring all railroads, corporations, companies and persons, operating a railroad and doing business in Iowa, to equip all their engines and cars with proper, efficient and safe automatic couplers and brakes, and for prescribing penalties for failure thereof."

this state, any car manufacturers or transportation company using or leasing cars, to put in use in this state any new cars or any cars that have been sent in to the shop or shops for general repairs, or whose draft rigging has to be repaired with a new draw bar or bars, that are not equipped with safety or automatic couplers to draw bars, such as will not necessitate the going between the ends of the cars to couple or uncouple them, but operated from the side of the car.

On all cars; when. 23 G. A., ch. 18, § 2. After January first, 1895, it shall be unlawful for any corporation, company or persons operating a railroad, or any transportation company using or leasing cars of any description and used in the commerce of the country, or in the construction of railroads, to have upon any railroad in Iowa for use in transportation of freight or passengers any car that is not equipped with such safety automatic coupler as provided for in section one of this act.

Power brakes on locomotives. 23 G. A., ch. 18, § 3. It shall be unlawful for any corporation, company or person operating any line of railroad in this state, to use any locomotive engine upon any railroad or in any railroad yard in this state after the first day of January, 1892, that is not equipped with a proper and efficient power brake, commonly called a "driver brake."

Power brakes on trains. 23 G. A., ch. 18, § 4. It shall be unlawful for any corporation, company or person operating a line of railroad in this state, to run any train of cars after the first day of January, 1893, that shall not have in that train a sufficient number of cars with some kind of efficient automatic or power brakes so that the engineer upon the locomotive car can control the train without requiring brakemen to go between the ends or on the top of the cars to use, as now, the common hand brake.

Reports as to cars. 23 G. A., ch. 18, § 5. Every railroad corporation, company or person operating a railroad in this state, and every person or persons using or leasing cars in the transportation business, or in building railroads, shall, and are by this act required to include in their annual report to the state railroad commissioners the number of locomotive engines and cars used in this state and what number is equipped with automatic power brakes and what number of cars equipped with automatic safety couplers and the kind of brakes and couplers used and the number of each kind, when more than one kind is used.

Penalty. 23 G. A., ch. 18, § 6. Any corporation, company or person operating a railroad in this state, and using a locomotive engine or running a train of cars or using any freight, way or other car, contrary to the provisions of this act, shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not less than five hundred dollars or not more than one thousand dollars, for the benefit of the school fund, for each and every offense. provided the penalties on this section shall not apply to companies in hauling cars belonging to railroads other than those of this state which are engaged in inter-state traffic and any railroad employee who may be injured by the running of such engine, or train or car contrary to the provisions of this law, shall not be considered as waiving his right to recover damage by continuing in the employ of such corporation, company or person running such engine or trains or cars contrary to this law.

BLACKLISTING EMPLOYES.

5429. Penalty. 22 G. A., ch. 57, § 1. If any person, agent, company or corporation, after having discharged any employee from his or its service shall prevent or attempt to prevent by word or writing of any kind such discharged employee from obtaining employment with any other person, company or corporation, except by furnishing in writing on request a truthful statement as to the cause of his discharge, such person, agent or corporation, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars nor less than one hundred dollars, and such person, agent, company or corporation shall be liable in penal damages to such discharged person to be recovered by civil action; but this section shall not be construed as prohibiting any person or agent of any company or corporation from informing in writing any other person, company or corporation setting forth a truthful statement of the reasons for such discharge.

5430. Treble damages. 22 G. A., ch. 57, § 2. If any railway company, any other company or partnership or corporation in this state shall authorize or allow any of its or their agents to blacklist any discharged

this state, any car manufacturers or transportation company using or leasing cars, to put in use in this state any new cars or any cars that have been sent in to the shop or shops for general repairs, or whose draft rigging has to be repaired with a new draw bar or bars, that are not equipped with safety or automatic couplers to draw bars, such as will not necessitate the going between the ends of the cars to couple or uncouple them, but operated from the side of the car.

On all cars; when. 23 G. A., ch. 18, § 2. After January first, 1895, it shall be unlawful for any corporation, company or persons operating a railroad, or any transportation company using or leasing cars of any description and used in the commerce of the country, or in the construction of railroads, to have upon any railroad in Iowa for use in transportation of freight or passengers any car that is not equipped with such safety automatic coupler as provided for in section one of this act.

Power brakes on locomotives. 23 G. A., ch. 18, § 3. It shall be unlawful for any corporation, company or person operating any line of railroad in this state, to use any locomotive engine upon any railroad or in any railroad yard in this state after the first day of January, 1892, that is not equip-

CHAPTER 23 OF THE ACTS OF THE TWENTY-FOURTH GENERAL ASSEMBLY.

AUTOMATIC CAR COUPLERS.

AN ACT to amend Chapter 18, of the laws of the Twenty-third General Assembly [*Relating to Automatic Car Couplers and Brakes*].

SECTION 1. That chapter 18, of the laws of the twenty-third general assembly be amended by striking out the first section thereof and inserting in lieu thereof the following, to-wit: "Section 1. That it shall be unlawful for any corporation, company or person operating any line of railroad within this state, any car manufacturers or transportation company using or leasing cars, to put in use in this state any new car or any old car that has been to the shop for general repairs to one or both of its draw-bars that is not equipped with automatic couplers so constructed as not to require any person or persons to be between the cars when the act of coupling or uncoupling is done."

SEC. 2. That section 2 of said chapter be amended by striking out from the first line thereof the figures "1895" and inserting in lieu thereof the figures "1898."

SEC. 3. That section 3 of said chapter be amended by striking out from the fourth line thereof the figures "1892" and inserting in lieu thereof the figures "1895."

SEC. 4. That section 4 of said chapter be amended by striking out from the third line thereof the figures "1893" and inserting in lieu thereof the figures "1895."

SEC. 5. That the said chapter be further amended by adding thereto as "section 7" thereof the following, to-wit:

"Section 7. That the board of railroad commissioners shall have power, upon a showing which it shall deem reasonable, to extend the time within which any such corporation shall be required to comply with the provisions of this act; except that no such extension shall be made beyond 1900.

After the first day of January, 1900, any common carrier shall refuse to accept or receive from any connecting line any car to be used within this state that is not fully equipped as required by this act."

This act being deemed of immediate importance shall take effect upon publication in the "Iowa State Register" and the "Des Moines Leader" newspapers published at Des Moines, Iowa.

Approved April 6, 1892.

BLACKLISTING EMPLOYES.

5429. Penalty. 22 G. A., ch. 57, § 1. If any person, agent, company or corporation, after having discharged any employee from his or its service shall prevent or attempt to prevent by word or writing of any kind such discharged employee from obtaining employment with any other person, company or corporation, except by furnishing in writing on request a truthful statement as to the cause of his discharge, such person, agent or corporation, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars nor less than one hundred dollars, and such person, agent, company or corporation shall be liable in penal damages to such discharged person to be recovered by civil action; but this section shall not be construed as prohibiting any person or agent of any company or corporation from informing in writing any other person, company or corporation setting forth a truthful statement of the reasons for such discharge.

5430. Treble damages. 22 G. A., ch. 57, § 2. If any railway company, any other company or partnership or corporation in this state shall authorize or allow any of its or their agents to blacklist any discharged employees or attempt by word or writing or any other means whatever to prevent such discharged employee or any employee who may have voluntarily left said company's service from obtaining employment with any other person or company except as provided for in section one hereof [§ 5429], such company or copartnership shall be liable in treble damages to such employee so prevented from obtaining employment, to be recovered by him by a civil action.

OBSTRUCTING HIGHWAY.

5955. Evidence of. 4557. In a prosecution against a railway company for obstructing a highway or any private way, proof that any such way is in an unsafe condition, or that it is inconvenient for travel at the place of its intersection with such railway, shall be presumptive evidence that such company has obstructed such way. [14 G. A., ch. 111, § 6.]

INDEX.

The numbers refer to sections and pages. The section numbers are the same as in McClain's Annotated Code, except in case of acts of the twenty-third general assembly. which are referred to by session, chapter and section. The numbers of the pages in this pamphlet are given last, following a semi-colon.

ERRATA.

On page 57 third paragraph should be 1971.
On page 75 second paragraph should be 1976 instead of 1796.
On page 127 third paragraph should be 2087 instead of 2078.